TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 474.

THOMAS F. HUNTER, SHERIFF OF BUNCOMBE COUNTY, STATE OF NORTH CAROLINA, APPELLANT,

vs.

JAMES H. WOOD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

FILED OCTOBER 5, 1907.

(20,877.)



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1 *Transcript of Record.*

Supreme Court of the United States.

In the Matter of the Application of JAMES H. WOOD for Writ of *Habeas Corpus.*

2 *Transcript of Record.*

THE UNITED STATES OF AMERICA,
Western District of North Carolina, To wit:

At a Circuit Court of the United States for the Western District of North Carolina, begun and held at the Court House in the City of Asheville on the 22nd, day of July in the Year of Our Lord One thousand nine hundred and seven.

Present: The Honorable J. C. Pritchard, Circuit Judge.

Among other were the following proceedings, to-wit:—

In the Matter of Application of JAMES H. WOOD for a Writ of *Habeas Corpus.*

3 *Petition of J. H. Wood.*

U. S. Circuit Court. Filed Jul- 19, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States, Western District of North Carolina.

In the Matter of the Application of JAMES H. WOOD for a Writ of *Habeas Corpus.*

To the Honorable J. C. Pritchard, Judge of the Circuit Court of the United States, Fourth Circuit:

Your petitioner Jas. H. Wood, respectfully states as follows:—

Your petitioner is a citizen of the State of North Carolina and a resident of the City of Asheville, County of Buncombe, and the Western District of said State, and has been unlawfully arrested, and is unjustly and unlawfully detained in the custody of Thomas F. Hunter who is the Sheriff of Buncombe County of the State of North Carolina, by virtue of a mittimus issued by one, G. S. Reynolds, Police Justice of the Police Justice's Court of the City of Asheville, County of Buncombe and State of North Carolina, a copy of which mittimus is hereto attached marked "Exhibit "A" and made a part hereof.

On the 17th day of July, 1907, one G. S. Reynolds, Police Justice of the Police Justice's Court of the City of Asheville, County of Buncombe and State of North Carolina, upon the complaint upon oath of one T. J. Harmon, made to him, issued his war-

rant directed to the Chief of Police or any Policeman of the City of Asheville, or other lawful officer of said City or Buncombe County, commanding him or them to arrest the body of James H. Wood, your petitioner, and one O. C. Wilson, and them safely keep so that he or they have them before the said G. S. Reynolds, Police Justice as aforesaid, at 9 o'clock, A. M., on the 18th day of July, 1907 then to answer the charge above set forth; that is, the charge set forth in the complaint, a copy of which complaint and of said warrant is hereto attached, marked Exhibit "B," and hereby made a part hereof.

4 Said Warrant charges that your petitioner as "agent of Southern Railway Company, did unlawfully and wilfully overcharge the said T. J. Harmon for a Railroad ticket from Asheville, North Carolina, to Canton, North Carolina, in violation of the State law and contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State."

Said warrant was issued by said Police Justice, was placed for execution in the hands of said Thomas F. Hunter, Sheriff of Buncombe County, North Carolina, who did, by virtue of the same and as commanded therein, arrest the body of your petitioner and take him into his custody on the 17th day of July, 1907, and retained the body of your petitioner in his custody until the hour of 9 *o'dock,* A. M., on the 18th Day of July 1907, at which time he, the said Thomas F. Hunter, as such Sheriff produced the body of your petitioner before said Police Justice's Court of the City of Asheville, in said County and State, when and where said Court, the said G. S. Reynolds, Police Justice, presiding therein, proceeded to try and inquire into the charges contained in said warrant against your petitioner, and did upon the conclusion of the said trial and inquiry adjudge that your petitioner, the defendant named in said warrant was guilty as charged in said warrant, and thereupon considered and adjudged that your petitioner be imprisoned in the County jail of Buncombe County for a term of thirty days, and upon application of the Board of County Commissioners of Buncombe County that he be duly assigned to them to be worked on the public roads of said County for such term, and that he pay all costs and be discharged according to law.

Upon the rendition of said judgment against your petitioner by said police Justice's Court there was issued by said Court said mittimus above referred to, a copy of which is hereto attached marked Exhibit "A," and made a part hereof, and the same was immediately delivered into the hands of the said Thomas F. Hunter, Sheriff as aforesaid, who immediately arrested and took into his custody the body of your petitioner and still holds the body of your petitioner in such custody and will continue to so detain and *and* hold — his custody the body of your petitioner unless prevented from so doing by the action of this Honorable Court.

5 Your petitioner further states that when called upon to plead in said Police Justice's Court to the charges contained in said warrant he duly made and filed therein his written plea and answer to said charge 1st., that he was not guilty of the

charges contained in said warrant 2nd. that said Court had no jurisdiction of the offense charged against him in said warrant; 3rd, that he was in the custody of said Sheriff of Buncombe County and held at the bar of said Court to answer to the charge contained in said warrant, as aforesaid, in violation of the Constitution and laws of the United States and for an act done by him in pursuance of the decree of the Circuit Court of the United States, and he specially further pleaded in his defense all the matters and things in this petition shown, and hereinbelow stated.

6 Your petitioner is in custody as aforesaid in violation of the Constitution and laws of the United States, and for an act done in pursuance of a decree of the Circuit Court of the United States.

The General Assembly of North Carolina passed an act entitled "An act to prevent unjust discrimination in freight rates and to fix maximum charges therefor," which was ratified on the ninth day of March, 1907, and is hereinafter referred to as the "Act in respect of freight rates." The said act provided, among other things, for the reduction of the joint rates to be charged by common carriers for transporting freight in North Carolina.

The General Assembly of North Carolina also passed an act entitled "An act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina," which Act was ratified on the second day of March, 1907, and is hereinafter referred to as the "Act in respect to passenger rates." Said act provided, among other things, that no railroad company doing business as a common carrier of passengers in the State of North Carolina, except as therein provided, should charge or receive for transporting any passengers, and his or her baggage not exceeding in weight two hundred pounds, from any station on its railroad in North Carolina to any other station on its railroad in North Carolina, a rate in excess of two and one-fourth cents per mile, and for transporting children twelve years of age or under, one-half of the rate above described. Said act, among other things, further provided, by section 4 thereof, that any agent, servant, or employee of any railroad company violating the said act should be guilty of a misdemeanor, and upon conviction should be fined or imprisoned, or both, in the discretion of the court. Said act in respect to passenger rates is the act for the violation of which your petitioner has been indicted and arrested and is in custody as aforesaid.

7 Each of said acts provided that it should be in force from and after July 1, 1907.

On the eighth day of May, 1907, the Southern Railway Company, a corporation and a citizen of the State of Virginia, filed its bill of complaint in the Circuit Court of the United States for the Eastern District of North Carolina against Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, constituting the Corporation Commission of North Carolina, and Robert D. Gilmer, the Attorney-General of North Carolina, and Hayden Clement, the Assistant Attorney-General of North Carolina, and by said bill of com-

plaint alleged that the effect of the said acts, whether taken separately or together, if enforced, would, under the facts and for the various reasons set forth in said bill, deprive said complainant of its property without just compensation, and without due process of law, and would deny to complainant the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States. A true copy of said bill of complaint is hereto attached and made part hereof, marked Exhibit "C." The said bill of complaint truly sets forth in full the said Act in respect to freight rates and the said Act in respect to passenger rates.

Upon the filing of said bill process was duly issued against, and served upon, the defendants named therein. Thereupon said cause came on to be heard before Honorable J. C. Pritchard, Judge of the said Circuit Court, upon the motion of the complainant for an interlocutory injunction, in accordance with the prayer in the said bill of complaint, and each and all of the said defendants appeared generally thereto and filed their answer therein, and upon a full hearing of said motion a decree was entered in said cause on the 29th day of June, 1907, a copy of which is hereto attached and made part hereof, marked Exhibit "D."

By said decree the defendants Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, constituting the said Corporation Commission, and each of them individually, and jointly, as constituting the said Corporation Commission, and their successors, agents and employees, were enjoined and restrained from preparing or publishing the tariff of rates mentioned in the fifth section of said Act in respect to freight rates, and from classifying the railroads in accordance with and from publishing the rates fixed by said Act in respect to passenger rates, and were further enjoined together with the defendants Robert D. Gilmer, Attorney-General, and Hayden Clement, Assistant Attorney-General, their successors, attorneys, agents and employees, from taking any steps in pursuance of either of said acts or of any of the laws of the State of North Carolina, for the purpose of enforcing or endeavoring
8 to put into effect, as against said complainant or any of its officers, agents or employees, or to force said complainant or any of its agents or employees to put into effect either of said Acts or any part thereof, or the penalties prescribed or provided for in either of said Acts, or any other penalties or punishments against said complainant, or against any of its officers, agents or employees, for failure to put into effect or to observe on any of the lines of said complainant in North Carolina the freight rates or passenger rates prescribed or provided for in said Acts, or either of them, or for failure to comply with either of said Acts, or with any provision of either of them. By said decree all other individuals and corporations were, and each of them was, restrained and enjoined from instituting or prosecuting any suit of prosecution, or other proceeding, either civil or criminal, against said complainant or against any officer, agent or employee of said complainant, for the recovery or imposition of any penalty or punishment under or by virtue of

said Act in respect to passenger rates, or under or by virtue of any law of North Carolina, because of, or growing out of, the failure of the said complainant, or any of its officers, agents or employees, to put into effect, or to observe, on any of the said complainant's lines in North Carolina the passenger rates prescribed in said Act in respect to passenger rates, or to comply with any of the provisions of said Act, or for the recovery of any damages or overcharges, because of, or growing out of any such failure, or for the enforcement of any claim, alleged right or cause of action growing out of or connected with any such failure.

Said decree further provided that said complainant should, before a Judge of said court, or the Clerk thereof, execute a bond in the penalty of three hundred and twenty-five thousand dollars, with surety to be approved by such Judge or Clerk, conditioned to pay into the registry of the court from time to time, as ordered by the court, such sums of money as should be equal to the difference between the aggregate freight and passenger rates and excess baggage charges charged and received by it for intrastate services on its lines in the State of North Carolina, and what would have been the aggregate amount for such services at the rates fixed in or under said acts, and further conditioned to pay, in the event such injunction should be dissolved or vacated as having been wrongfully issued, or because the said acts were improperly restrained, all damages caused by the issue of such injunction and the costs of this cause in connection therewith.

Said decree further provided that the complainant should give to any person purchasing a ticket for intrastate travel on its lines in North Carolina a transferable coupon, or other written or printed evidence, representing the sum which such person, or his
9 transferee, would, upon a final decision in said cause upholding the validity of said Act in respect to passenger rates, be entitled to receive out of the case deposit to be made in the registry of this court, in pursuance of the obligation of said bond. And said decree prescribed the form of said coupon or other written or printed evidence which should be substantially followed and used by said complainant.

Said decree further provided that the complainant should preserve, to be produced when so ordered by the court, all canceled tickets in respect to which such coupons, or other written or printed evidence, should be issued and outstanding, and should, from time to time, report to the court statements showing the revenues by it charged and collected for its services in the North Carolina intrastate transportation of passengers, baggage and freight in excess of the amount permitted by said Acts.

Upon the entry of said decree the complainant executed before the Judge of said court the bond provided for in said decree, and said bond and the surety thereon were duly approved by such Judge, and thereupon a writ of injunction was issued, as provided in said decree.

Ever since the entry of said decree on June 29, 1907, the same, and the writ of injunction issued thereunder, have been, and now are, in full force and effect in all respects, and neither said decree nor said writ of injunction has been modified in any way.

Your petitioner is an employee, to-wit, a District Passenger Agent of said complainant, Southern Railway Company, at Asheville, in the State of North Carolina in said Western District.

Your petitioner further showeth to this Honorable Court, that the Southern Railway Company, the Complainant, in the said original Bill has duly filed in the Circuit Court of the United States for the Western District of North Carolina, at Asheville, an Ancillary Bill, wherein the Southern Railway is complainant, and Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, con-cituting the Corporation Commission of North Carolina, and each of them individually and jointly, as constituting said Corporation Commission, and each and all of their successors in office, their and each of their attorneys, agents and employees, and the defendants Robert B. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, and J. A. Spence, Elijah Moffitt, J. R. McKenzie, E. B. Hatch, W. C. Hurley, F. A. Henley W. M. Hooker, Charles A. Armstrong, L. F. Nance Spencer Howell, Robert Howell, Coon Howell Henry Smitherman, Jessee Eldridge, Claude Howell Wallace Armstrong, Guy Smitherman, J. Way and B. C. Beckwith, and in which said ancillary bill all of the proceedings of the original bill were set out, and this Honorable Court has taken jurisdiction in the Western District in aid of the original bill. A true copy of said ancillary bill is hereto attached and made part hereof, marked Exhibit "E."

10 Your petitioner has in all respects complied with said decree, and with respect to the transaction attempted to be set up in the said indictment the things done by this petitioner were done by him in compliance with and in pursuance of said decree.

The question of the validity of said Act in respect to passenger rates, is one of which full jurisdiction has been rightfully taken by said Circuit Court in the suit above described, and any effort to enforce the provisions of said act by indictment in another form necessarily interferes with and if successful will defeat the jurisdiction and control of said Circuit Court over the said controversy.

If for any reason it should be adjudged that it is the intent and effect of the laws of North Carolina that there can be no such judicial review as is involved in said cause of the constitutionality of said act in respect to passenger rates, or that notwithstanding such judicial review the penalties and punishments prescribed in section four of said Act in respect to passenger rates may be imposed and inflicted for acts done during the pendency of said judicial review and under the protection of the court having jurisdiction thereof, then the provisions of said section four of the Act in respect to passenger rates imposing penalties and punishments are unconstitutional and void because in conflict with the fourteenth amend-

ment to the Constitution of the United States, the benefit and protection of which petitioner hereby sets up and claims.

Your petitioner further states that the Police Justices' Court — the City of Asheville, said county of Buncombe, State of North Carolina, in which the said conviction was had was without jurisdiction of the offence charged.

Wherefore, to be relieved of said unlawful detention your petitioner prays that a writ of *habeas corpus*, to be directed to the said Thomas F. Hunter may issue in this behalf, so that your petitioner may be forthwith brought before Your Honor, to do, submit to, and receive what the law may direct.

JAMES H. WOOD.

STATE OF NORTH CAROLINA,
County of Buncombe, To wit;

James H. Wood being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same, knows the contents thereof, and that the said statements are true, as he verily believes.

Sworn to before me and subscribed, this 18″ day of July, 1907.

[SEAL.] JOSEPH F. FOARD,
Notary Public in and for Buncombe County, North Carolina.

My Commission expires April 23, 1909.

11 *Coupon.*

U. S. Circuit Court. Filed Jul- 19, 1907. W. S. Hyams, Clerk.

"L" Punch Marks in this Blank Space Indicate Nothing.

Form N. C. Lo. 25.

S. R. Issued by Southern Railway Co.

North Carolina Ticket Claim Coupon.

Issued at (228) Asheville "B." N. C.

To Be Retained by Passenger—Not Good for Passage.

Issued under an order of the Circuit Court of the United States for the Eastern District of North Carolina, in a suit therein pending between Southern Railway Company, Complainant, and Franklin McNeill, *et als.*, Defendants.

Southern Railway Company, has on the date stamped hereon, received in connection with the sale of the ticket of corresponding form and number, the rate designated in the tariff of this Company in effect on date of sale, for travel between points designated in such ticket within the State of North Carolina, to which ticket this coupon is attached.

This coupon is evidence only of a claim for the difference between the amount received and what would have been the amount if the distance covered by said ticket had been paid for at the rate fixed by North Carolina Act approved March 2, 1907, prescribing maximum passenger charges, and is payable only on the order, and out of the registry, of said court, upon surrender to the court of this coupon, and upon such conditions, if any, as said Court may impose, provided it should be finally determined in said suit that the said claim is entitled to such payment.

421.

In case the ticket with which this coupon corresponds is presented for redemption, it must be presented at General Passenger office, Washington, D. C., accompanied by this coupon, either for surrender or for appropriate notation.

W. H. TAYLOE,
General Passenger Agent.

Endorsed on the back: Southern Railway Co., Asheville, N. C. Jul- 14, 1907.

12 EXHIBIT A—MITTIMUS.

U. S. Circuit Court. Filed Jul- 19, 1907. W. S. Hyams, Clerk.

STATE OF NORTH CAROLINA,
Buncombe County, City of Asheville:

In Police Court.

STATE AND CITY
vs.
J. H. WOOD.

This is to certify that — a Police Court held in and for the City of Asheville on this the 18 day of July 1907, J. H. Wood was tried and convicted of the offence of overcharging R. R. ticket, and was duly sentenced by the Court to imprisonment in the County jail of Buncombe County for a term of 30 days and upon application of the *of the* Board of County Commissioners of Buncombe County, said J. H. Wood is duly assigned to them to be worked on the public roads of said County for such term, pay all costs and be discharged according to law.

G. S. REYNOLDS, *P. J.*

13 EXHIBIT B.

Warrant & Summons for Violating State Laws.

U. S. Circuit Court. Filed Jul- 19, 1907. W. S. Hyams, Clerk.

NORTH CAROLINA,
Buncombe County, City of Asheville:

Police Justice's Court.

Charge: Violation of Ordinance No. —.

T. J. Harmon Maketh oath that on or about the 14th day of July 1907, in the City of Asheville, North Carolina, J. H. Wood, Agent of Southern Railway Co., and O. C. Wilson, Agent Southern Railway Co. did unlawfully and wilfully overcharge said affiant for a railroad ticket from Asheville, N. C. to Canton, N. C. in violation of State law, and contrary to the form and statute in such cases made and provided, and against the peace and dignity of the State.

T. J. HARMON.

Sworn to and subscribed before me, this the 17 day of July 1907.

G. S. REYNOLDS,
Police Justice.

State of North Carolina to the chief of police or any policeman of the city of Asheville, or other lawful officer of said city or Buncombe County, Greeting:

We command you to arrest the bodies of J. H. Wood and O. C. Wilson and them safely keep so that you have them before me at 9 o'clock A. M. on the 18 day of July 1907, then and there to answer the *the* charge above set forth.

G. S. REYNOLDS,
Police Justice.

Endorsed: State and City of Asheville *vs.* J. H. Wood & O. C. Wilson. Warrant and Summons for violation ordinance No. —. Before G. S. Reynolds, P. J. Officer's return. The within warrant received this 17 day of July, 1907. Executed 17 day of July, 1907, by arresting J. H. Wood and O. C. Wilson and bringing before G. S. Reynolds, P. J., for trial at 9 o'clock A. M. 18 day of July. T. F. Hunter, Sheriff. C. F. Williams, C. P.

14 EXHIBIT C.

#675.

Original.

In the Circuit Court of the United States for the Eastern District of North Carolina, to-wit:

In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
v.
FRANKLIN MCNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, ROBERT D. GILMER, and HAYDEN CLEMENT, Defendants.

Bill of Complaint.

Claudian B. Northrop, W. B. Rodman, solicitors for complainant.
Francis Lynde Stetson, Alex. P. Humphrey, Walker D. Hines, Alfred P. Thom, of counsel.
Filed May 9, 1907, H. L. Grant, clerk.
Office of U. S. Marshal, Raleigh, N. C., May 9, 1907.

15 In the Circuit Court of the United States for the Eastern District of North Carolina, to-wit:

In Equity.

SOUTHERN RAILROAD COMPANY, Complainant,

v.

FRANKLIN MCNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, ROBERT D. GILMER, and HAYDEN CLEMENT, Defendants.

To the Honorable Judges of said Court:

The bill of complaint of Southern Railway Company, a corporation of the State of Virginia, duly organized and existing under and by virtue of the laws of that State, having its principal office in the city of Richmond, in the State of Virginia, and being a citizen of said State, against Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, Robert D. Gilmer, and Hayden Clement, defendants, all of said defendants being citizens of the State of North Carolina.

And thereupon your complainant says:

1. The citizenship of the parties complainant and defendant is as above set forth.

2. That in the year 1894, under an act of the General Assembly of the State of Virginia, approved February 20, 1894, entitled "An Act authorizing the purchasers of the Richmond and Danville Railroad, their assigns and successors, to become and be a cor-
16 poration, to adopt a name therefor, and to possess and exercise general powers; and authorizing the leasing to or by, and the consolidation therewith of, other corporations," the complainant was duly incorporated and organized into a railroad corporation. A true copy of its said charter is herewith filed as a part of this bill, marked Exhibit No. 1.

3. That by the terms of its charter it was authorized to own, operate and control lines of railroad in other States as well as in Virginia, and under and by virtue of such powers, and under and by virtue of due authority from the States about to be mentioned, the complainant owns, or controls and operates, and continuously since its said organization has operated and controlled, lines of railroad (in addition to those which it owns, operates and controls in the State of Virginia) in the States of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, Kentucky, Indiana and Illinois. That portion of its road lying in the State of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi and Tennessee comprises lines 6989.12 miles in length and constitutes a continuous system of railroads, and that portion of its lines lying in the States of Kentucky, Indiana and Illinois comprises lines 526.73 miles in length and constitutes another continuous system of railroads. These two systems are not connected by rails owned by this complainant, but are connected

by traffic arrangement with another line of road. That portion of its road which it so owns, or controls and operates, in the State of North Carolina is 1,456.72 miles in length, and for a considerable number of years has been more than 1,400 miles.

4. That the complainant is, and continuously since its organization aforesaid has been, engaged in doing an intrastate business as a common carrier or freight and passenger in the State of North Carolina, and in addition is, and continuously since its said organization has been, engaged in doing, as a common carrier of freight and passengers, a large interstate business in said State of North Carolina, and in and between said State and the other States aforesaid, and other States of the United States, and in and between other States and Territories of the United States, and also is, and since its said organization has been, engaged in said State and the other States aforesaid in foreign commerce.

5. That at its session held in the year 1907, and just ended, the General Assembly of North Carolina passed an act entitled "An Act to prevent unjust discrimination in freight rates and to
17 fix maximum charges therefor." The said act was ratified on the ninth day of March, 1907, and is hereinafter referred to as the "Act in respect to Freight Rates." The said act is as follows:

An act to prevent unjust discrimination in freight rates and to fix the maximum charges therefor.

The General Assembly of North Carolina do enact:

SECTION 1. That the Corporation Commission, created by the laws of North Carolina, shall not, in fixing the maximum rates and charges, or tariff or rates or charges for any common carrier transporting freight in North Carolina, permit or allow any such common carrier to charge, collect or receive a greater toll, charge or rate for the transportation of any article of freight or commodity embraced in the present classification fixed and prescribed, or approved by said Corporation Commission where the initial point of shipment is on the road or line of one common carrier in this state and the terminal point of said shipment is on the line or road of another common carrier in this state, than is the sum of the present local rates now established, prescribed or approved by said Corporation Commission, less a reduction of twenty-five per centum of the said local rates on all railroads for which there is now made or prescribed a reduction for a joint haul; and on those railroads for which there is not now prescribed a reduction on joint hauls a reduction of fifteen per centum of the local rates now established, prescribed or approved by said Corporation Commission for said railroads; Provided that those railroads of this class whose rates are lower than the Corporation Commission's standard of freight rates may be permitted by said commission to adopt the standard rates prescribed by said commission; Provided that the Corporation Commission is hereby empowered to reduce the said local rates whenever in its opinion and after investigation by it it shall determine that a lower

rate is reasonable: Provided, further, That present local rates now established, prescribed or approved by said Corporation Commission shall not be increased by classification or otherwise.

SECTION 2. That any railroad company doing business in the State of North Carolina, or officer or agent thereof, who shall give to any person or shipper any advantage over another person or shipper under like circumstances by way of any rebate or reduced rate not authorized by law, or by the North Carolina Corporation Commission, or which shall make charges for shipments of freight in violation of the provisions of this act, or shall wilfully discriminate in the matter of service in favor of one person or corporation against another under like circumstances, shall be guilty of a misdemeanor, and such corporation shall, upon conviction, be fined not
18 less than one hundred dollars, and such officer or agent shall be fined or imprisoned or both, in the discretion of the court; and any shipper or consignee of any freight in the State of North Carolina who shall knowingly accept any rebate or other consideration or service from any railroad company which is not allowed or given other shippers or consignees under like or similar circumstances, and which is not allowed by law, shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court.

SECTION 3. That whenever any person, firm or corporation intending to ship freight makes a written application to any railroad company for a car or cars to be loaded in carload lots with any kind of freight embraced in the tariffs of said company, stating in said application the character of the freight, the number of cars wanted, the station, depot siding, wharf or boat landing on the road or line of said railroad company whence the shipment is to be moved, and its final destination, the railroad company shall furnish the said car or cars within four days from seven o'clock a. m. the day following such application, which said application shall be delivered to the agent of the railroad company at the station at or nearest the point of shipment. Any railroad company failing to furnish the car or cars named in said written application shall be subject to a penalty of five dollars per car per day for each car not furnished, to be recovered by the person, firm or corporation making said application: Provided that the said railroad company before furnishing the car or cars upon said application of the shipper may require the person, firm or corporation applying for the same to deposit five dollars for each car so demanded at the time the application is made, which said deposit of five dollars for each car may be retained by the said railroad company as a forfeit for trackage, in case the car or cars are not loaded within forty-eight hours after notice of the placing of said car or cars in accordance with said demand: Provided that the Corporation Commission may excuse from the penalties imposed by this section independent lines not owned, operated or controlled by any other line or system when trackage is less than one hundred miles.

SECTION 4. That section two thousand six hundred and thirty-two of the Revisal of one thousand nine hundred and five of North Carolina be, and the same is hereby amended as follows: By striking

out the words "twenty-five" in line eleven of said act and inserting in lieu thereof the word "fifteen," and by striking out the word "five," the last word in said line, and inserting in lieu thereof the word "two," and by further striking out the words "twelve and fifty one-hundredth-" in lines fourteen and fifteen thereof and inserting in lieu thereof the word "ten," and by further striking out the words "two and fifty one-hundredth-" in line fifteen and inserting in lieu thereof the word "one."

That this section four shall not apply to existing causes of action.

SECTION 5. The Corporation Commission is hereby directed to prepare and publish the tariff of rates, charges and tolls to be charged and collected by railroad companies in this State, as authorized by this act, on or before July the first, one thousand nine hundred and seven.

SECTION 6. This act shall be in force from and after July the first, one thousand nine hundred and seven.

In the General Assembly read three times and ratified this the 9th day of March, 1907.

That the General Assembly of North Carolina, at its said session, also passed an act entitled "An Act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina," which was ratified on the 2d day of March in the year 1907, and is hereinafter referred to as the "Act in respect to Passenger Rates." Said act is as follows:

An act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina.

The General Assembly of North Carolina do enact:

SECTION 1. That no railroad company doing business as a common carrier of passengers in the State of North Carolina, except as hereinafter provided, shall charge, demand or receive for transporting any passenger, and his or her baggage not exceeding in weight two hundred pounds, from any station on its railroad in North Carolina to any other station on its said road in North Carolina, a rate in excess of two and one-quarter cents per mile, and for transporting children twelve years of age or under, one-half of the rate above described: Provided that the Corporation Commission of North Carolina is hereby authorized and empowered to permit all independently owned and operated railroad companies in North Carolina, whose mileage of road in said State is sixty miles or under, to charge a rate for transporting passengers not in excess of the present rate fixed and prescribed for said road; and also to permit all railroads constructed within the twelve months preceding the first day of January, nineteen hundred and seven, or at that time in course of construction, for a term of two years from and after July 1st, 1907, and also such railroads as may be constructed within two years from January 1, 1907, to charge such rate in excess of the rate above prescribed as the said Commission may determine to be reasonable. A

charge of ten cents may be added to the fare of any passenger when the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train; and no railroad company shall be required to accept a single fare for less than five cents.

SECTION 2. In the case that any railroad company operating as a common carrier of passengers in the State of North Carolina is owned, controlled or operated by lease or other agreement by any other railroad company doing business in this State, the rate for carrying passengers thereon as prescribed in this act shall be determined for said railroad by the rate prescribed by this act for the railroad company which owns, controls or operates the same; and the North Carolina Corporation Commission shall publish the rates fixed by this act for the several railroad companies operating in this State, on or before the first day of June 1907.

SECTION 3. That mileage books of one thousand miles in each book shall be kept on sale at such railroad ticket offices in North Carolina as shall be named and designated by the Corporation Commission of North Carolina, and when such mileage book is purchased it shall be good in the hands of any person or persons named therein on all railroads on which the fare is the same as or less than the fare on the road of the company selling such mileage book; and when the mileage is detached from said book by any other railroad company than the one which sold it, the said mileage shall be redeemable on demand by the railroad company which sold it.

SECTION 4. That any railroad company violating any provision of this act shall be liable to a penalty of five hundred dollars for each violation, payable to the person aggrieved by such violation, and recoverable in an action to be instituted in the name of said person in any court of this State having competent jurisdiction thereof. And any agent, servant, or employé of any railroad company violating this act shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the Court.

SECTION 5. That any person or persons, except those permitted by law, who accept free transportation shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the Court.

SECTION 6. That section 2618 of the Revisal of 1905 is hereby repealed, and all laws and clauses of laws in conflict with this act are hereby repealed.

SECTION 7. That this act shall be in force from and after July 1st, 1907.

6. At its session held in the year 1899 the General Assembly of North Carolina passed an act entitled "An Act to establish the North Carolina Corporation Commission." Said act has been since amended and as amended provides for the election of three commissioners who shall be known as the North Carolina Corporation Commission, and that each of said commissioners shall take an oath to support the constitution and laws of the state

of North Carolina and to well and faithfully execute the duties of his office as a member of the North Carolina Corporation Commission. Said act, as so amended, further provides that said commissioners shall have such general control and supervision of all railroad companies or corporations engaged in the carrying of freight or passengers necessary to carry into effect the provisions of said act and shall have full power to obtain the information necessary for carrying into effect, and otherwise enforcing, the provisions of said act. Said act, as so amended, further provides that if any railroad doing business in the state of North Carolina, or if any such company organized under the laws of any other state and doing business in the state of North Carolina shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, such railroad or company shall be deemed guilty of extortion and upon conviction thereof shall be fined not less than five hundred dollars nor more than five thousand dollars. Said act, as so amended, further provides that any railroad or corporation which violates any of the provisions of said act, or refuses to conform to, or obey, any rule, order or regulation of said commission shall in addition to the other penalties prescribed in said act forfeit and pay the sum of five hundred dollars for each offense to be recovered in an action to be instituted in the Superior Court of Wake county in the name of the state of North Carolina on the relation of the North Carolina corporation commission, and that each day such company, or corporation, continues to violate any provision of said act or continues to refuse to obey or perform any rule, order or regulation prescribed by said North Carolina Corporation Commission shall be a separate offense. Said act, as so amended, further provides that said corporation commission whenever in its judgment any corporation has violated or neglected in any respect to comply with the provisions of any law of the state, shall give notice thereof in writing to such corporations, and, if the violation or neglect is continued after such notice, shall forthwith present the facts to the attorney general who shall take such proceedings thereon as he may deem expedient. By the laws of North Carolina the Assistant Attorney General is invested with the same powers, and is required to perform the same duties, as the Attorney General, among them being the powers and duties just mentioned as appertaining to the Attorney General.

22 7. That the above mentioned defendants, Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, constitute the Corporation Commission of the State of North Carolina, the said Franklin McNeill being Chairman, and the said Samuel L. Rogers and Eugene C. Bedingfield being associate members, thereof, and that the defendant Robert D. Gilmer is the Attorney General of the State of North Carolina and the defendant Hayden Clement is the Assistant Attorney General of said State; and all of said defendants have their offices in the city of Raleigh in the State of North Carolina, and the defendants Franklin McNeill, Eugene C. Beddingfield and Robert D. Gilmer are inhabitants of, and reside in, the Eastern District of North Carolina.

8. That the effect of said "Act in respect to Freight Rates" and of the said "Act in respect to Passenger Rates," whether taken separately or together, if enforced, would, as will appear from the considerations now about to be set forth, be to deprive the complainant of its property without just compensation, and without due process of law, and to deny to it the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, the benefit and protection of which the complainant respectfully sets up and claims.

The existing rates and charges in effect upon this complainant's lines in the State of North Carolina, and applicable to intrastate business in said State, are not higher than is just and reasonable, whether considered in respect to the value of the property used in the public intrastate service in said State, or in respect to the value of the service rendered to the shippers or to the travelers upon its lines. These rates and charges now in use on complainant's lines in North Carolina are, in respect to the traffic covered by the said "Act in respect to Freight Rates," the sum of the present local rates, now established, prescribed or approved by the said Corporation Commission, less a reduction of fifteen per cent. of the said local rates, and, in respect to passenger traffic covered by the said "Act in respect to Passenger Rates" are the rates and charges now established, prescribed and approved by the said Corporation Commission, namely, three and one fourth cents per mile for first class fare, and two and three fourths cents per mile for second class fare.

The complainant further shows that the effect of the said "Act in respect to Freight Rates," and of the said "Act in respect to Passenger Rates," now proposed to be put into effect, upon the business of this complainant between points both of which are
23 in the State of North Carolina, and which does not pass out of said State en route, for the year ending June 30, 1906, is as follows:

The maximum actual net earnings from North Carolina intrastate business for said year, after deducting the proper proportion of improvements and betterments not capitalized, and the proper proportion of taxes, were.....	$324,754.64
Whereas under the proposed rates and charges in North Carolina, such maximum net earnings on the business of the same year would have been.....	28,007.47
Showing a reduction of such actual net earnings from North Carolina intrastate business for said year under the proposed rates and charges of at least....	$296,747.17

The foregoing maximum actual net earnings are arrived at as follows:

The maximum earnings from intrastate traffic in North Carolina, after paying the cost of operation for said year amounted to		$453,811.41
The ratio of the intrastate gross traffic revenue in North Carolina for said year to the entire gross traffic revenue of the North Carolina lines of this complainant covering both inter and intra state traffic in North Carolina for said year, is	27.60%	
27.60% of the gross taxes ($269,651.18) paid in North Carolina by complainant in said year, is	$74,423.73	
27.60% of the improvements and betterments, not capitalized, chargeable to complainant's North Carolina properties during said year ($197,945.81), is	54,633.04	
Total taxes and improvements and betterments so chargeable against intrastate traffic		$129,056.77
Leaving maximum net intrastate earnings as above mentioned, after deducting the said proportion of taxes, improvements and betterments		$324,754.64

24 The complainant further shows that the effect of the establishment of the proposed rates and charges would not be limited to the intrastate business in North Carolina of this complainant but would inevitably affect the interstate business of this complainant and impair and diminish the revenue derived therefrom. This inevitably follows from the fact that many of its interstate rates on freight, and all, or nearly all, of its interstate rates for passengers, are made, and necessarily made, on a combination of locals, or by the use of locals as factors, and, where the local rate within the State of North Carolina is reduced, the inevitable effect upon the revenues of this complainant from its interstate business would be a reduction, and accordingly the total loss which this complainant would have to incur, in the event that the proposed rates and charges are made effective, would not be represented simply by the figures above given but a very considerable and appreciable loss would necessarily be added thereto, growing out of the reductions on its interstate business, as aforesaid.

In addition to this, the General Assembly of North Carolina, at its session of 1907, passed and enacted various other public statutes, the direct, immediate, and necessary effect of which will be to greatly increase the cost of the complainant's operations in that State, the titles of which said acts are as follows, namely:

"An Act to provide for the assessment of real estate of railroad companies in stock law territory for local benefit," ratified on the eighth day of March, 1907.

The effect of this act will be to impose a new and additional tax upon complainant's properties in North Carolina.

"An Act to prescribe the hours of service of employees of railroad companies engaged in the operation of trains," ratified on the eighth day of March, 1907.

The effect of this act will be to largely increase the cost of labor in complainant's intrastate operations in North Carolina.

"An Act to authorize the Corporation Commission to require railroads to erect and maintain union depots in towns of two thousand inhabitants," ratified on the eleventh day of March, 1907.

The effect of this act will be to impose large pecuniary burdens on the complainant in North Carolina.

"An Act to extend and enlarge the powers of the Corporation Commission," ratified on the eleventh day of March, 1907.

True copies of said acts are herewith filed as a part of this bill, marked Exhibits Nos. 2, 3, 4, and 5, respectively.

25 The complainant further shows that there is, in respect to this complainant's property, as in respect to all other classes of property in the State of North Carolina, whether owned by individuals or corporations, a difference between the commercial and the tax assessment value, the commercial value being, in respect to all classes of property, greater than the value assessed for purposes of taxation, and, while this complainant does not admit, and, in fact, expressly denies, that the tax value assessment is as great as the value which ought to be considered for the purpose of determining its right to make reasonable earnings out of, and reasonable returns on, the property used by it in doing its business as a common carrier, and performing the public service required of it, as such, the complainant is advised that the State of North Carolina, having made the assessment for the purpose of taxation upon the complainant's property in said State, cannot deny that its property in that State is worth at least the amount of said assessment, and, in fact, its property in North Carolina is worth more than the amount of said assessment and it would cost more to reproduce it. If, however, the earnings which it can make under the proposed rates and charges are estimated only in reference to the said assessed value of its said property made by the State of North Carolina for the purposes of taxation, the complainant avers that the proposed rates and charges will not permit it to earn reasonable profits, and enjoy reasonable returns, even upon that valuation, and such rates and charges will deprive it of the legitimate use of its property.

The ad valorem assessment upon the properties of the complainant in North Carolina during the year ending June 30, 1906, made by the State of North Carolina was..... $26,134,865.00

Taking the proportion of this valuation which is used for the purpose of producing revenue from intrastate traffic in North Carolina, in the ratio which the gross intrastate traffic revenue in North Carolina, bear to the total gross traffic revenue in the State of North Carolina, which is the proper proportion for such purpose, and is 27.60 per cent., the value of the property used in North Carolina for intrastate purposes, on the basis of North Carolina's assessment for purposes of taxation, is shown to be..... 7,213,222.74

Even upon this valuation, the net earnings permitted to this complainant under the proposed rates and charges from its intra-
26 state business in the State of North Carolina would, for the year ending June 30, 1906, only amount to thirty-nine one-hundredths of one per cent. on the said tax value, before allowing anything for payment of interest on its bonds or dividends on its stock. Such returns are not as much as a reasonable profit upon the invested capital, or upon the actual value of the property used.

The complainant further shows that the total bonded indebtedness of this complainant applicable to its North Carolina property on the basis of setting out to North Carolina all of such indebtedness that is specially a lien upon North Carolina properties, and a lien upon no other properties, and taking the North Carolina mileage proportion of the general bonded indebtedness of the complainant, is..... $24,623,078.29

On which the annual interest charge which complainant is obliged to pay is..... 714,103.08

And that the annual trackage and rentals paid for lines in North Carolina by the complainant amount to..... 481,189.99

The net income from intrastate traffic in North Carolina should contribute its *pro rata* proportion to the payment of such interest and rental charges, namely, at least 27.60 per cent., or the sum of..... 329,900.89

But the total net earnings from intrastate traffic in the State of North Carolina under the proposed rates and charges would amount to only the sum of..... 28,007.47

Which would leave a deficiency, after paying the amount properly apportionable to intrastate traffic in the State of North Carolina of such interest and rentals of..... 301,893.42

and no returns whatever to the owners of said property.

Complainant says that the figures given in this bill in respect to the result on its revenues for the year ending June 30, 1906, are in their net result fairly representative of past and future conditions, except that the operating expenses of the complainant have since June 30, 1906, increased relatively far more than gross earnings and that the net result will be even more unfavorable and yield a still smaller return to the complainant than is here shown for the year ending June 30, 1906.

The general commercial conditions in North Carolina are prosperous, the transportation service rendered by the complain-
27 ant in intrastate transportation is large, and at reasonable rates the returns therefor to this complainant would be much greater.

The complainant further shows that there will be no compensatory increase in the business or tonnage of this complainant resulting from the proposed reduced rates, and that there will be no appreciable or substantial increase whatever in such business or tonnage, due to such reduced rates.

The lines of railway of this complainant have at all times been operated as economically as practicable, under the existing conditions, and its operating expenses have at all times, under the conditions confronting it, been as reasonably low in amount as they could be made by economical and judicious management, and it has not been possible, under the conditions existing, for the complainant to operate its road for less than it has been operated. In all respects it has confined its operating expenses, its taxes, its interest, and every other expenditure, within the lowest and narrowest limit reasonably practicable under existing conditions. The complainant, therefore, respectfully shows to this Honorable Court that the result of the said rates and charges would be to deprive this complainant of its property without just compensation, to deprive it of the equal protection of the laws, and to take its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, the benefit and protection of which it expressly sets up and claims.

9. Under the laws of the State of North Carolina, the Corporation Commission of that State is required to make reasonable and just rates of freight and passenger charges over the lines of railroad in that State, including the lines of the complainant, and, in pursuance of said duty, the said Commission did, prior to March 2, 1907, fix and establish rates of freight and passenger charges for this complainant which in the opinion of said Commission were reasonable and just, the rates so fixed by said Commission being, in respect to the freight traffic covered by said "Act in respect to Freight Rates," the sum of the locals less fifteen per cent., and being, in respect to the passenger travel covered by said "Act in respect to Passenger Rates" three and one-fourth cents per mile for first class, and two and three-fourth cents per mile for second class, and the rates so fixed by said Commission were in force, and were deemed by said Commission to be just and reasonable, at the time of the passage of said "Act in respect to Freight Rates," and said

"Act in respect to Passenger Rates." The complainant shows that since said rates were so fixed by the Commission the cost of performing the service by the complainant has largely increased,
28 and in consequence thereof said rates should, in order to be now just and reasonable, be increased instead of being decreased.

10. The complainant further shows that its present rates in North Carolina are not higher than a reasonable compensation for the service rendered by it to the shippers and to travelers on its lines, and are in no sense excessive or extortionate; that they are not unjustly, unduly, unreasonably or illegally discriminatory as between individuals, nor as between localities, nor as between different kinds of traffic, and that they in no way violate any law. The complainant is advised that it has, as an incident of its property and as a property right, the right to charge for each service which it renders a reasonable compensation, and that this complainant is protected by the Fourteenth Amendment to the Constitution of the United States in making receiving and collecting such charge. The effect of the proposed rates and charges would be to materially diminish this complainant's charges, and to reduce them greatly below what would be a reasonable compensation for the respective services rendered to the shippers and the travelers on its lines. The complainant is advised that to prevent it from charging a reasonable compensation for the service rendered the shipper or the traveler would be to deprive it of its property without just compensation, and without due process of law, and would be to deny to it the equal protection of the laws; and this complainant again claims, in this regard, the benefit and protection of the Fourteenth Amendment to the Constitution of the United States, and shows that if the proposed rates and charges are put into effect the result would be, as aforesaid, to deprive it of its property contrary to the said Fourteenth Amendment to the Constitution of the United States.

11. This complainant is further advised that it has, as an incident of its property and as a property right, the right to increase its charges whenever, under the circumstances then existing, its charges are less than a reasonable compensation for the service which it renders, and that what may be a reasonable charge today for a service may become an unreasonably low charge tomorrow, or at any time thereafter, if conditions in respect to the expense of the service, or other conditions, are so changed as to make it so. The complainant is therefore advised that any action by a State which attempts to fix a maximum charge beyond which the complainant cannot go, no matter how unreasonably low such maximum may become under changed conditions, would be to deprive the
29 complainant of its property right to increase its rate up to what would, under such changed conditions, be a reasonable compensation for the service rendered, and would, therefore, violate the Fourteenth Amendment to the Constitution of the United States. This complainant avers that the said "Act in respect to Freight Rates," and the said "Act in respect to Passenger Rates," both undertake to fix a maximum beyond which this complainant cannot

go, no matter what may be the circumstances, and that, therefore, said acts are unconstitutional and void, as being in violation of the Fourteenth Amendment to the Constitution of the United States. This complainant further shows that many of its existing rates are lower than is just compensation for the service rendered, and have heretofore yielded, and will continue to yield to the complainant much less than a reasonable return upon the value of its property employed in such service. Since they were fixed, the operating expenses of the complainant have, without its fault, been largely increased, the cost of equipment, of materials and supplies and of labor, necessary for its operation, having all largely increased, so that the net return to this complainant has become much less than it has heretofore been, and it is not now, and never has been, as much as this complainant is entitled to receive. All of said maximum rates fixed by the said acts of the General Assembly of North Carolina, both those in regard to freight, and those in regard to passengers, are lower than a just compensation for the service rendered, and are lower than would afford this complainant a reasonable and just return upon the value of its property used in performing the services in return for such rates, and that the effect of said acts, because thereof and also because said acts undertake to impose an immovable maximum, is to deprive this complainant of its property without due process of law and of the equal protection of the laws, and to take its property without just compensation, contrary to the said Fourteenth Amendment to the Constitution of the United States, the benefit and protection of which is again in this regard expressly set up and claimed.

12. This complainant further shows that its existing rate fabric is properly adjusted in its relation between its interstate rates and its State rates in North Carolina and in other States, and that all its charges, with perhaps trifling and negligible exceptions;—exceptions which, if they exist, are entirely unimportant in the present connection—are just and reasonable in themselves, and do not and will not give to this complainant more than a just and reasonable return upon the value of its property used in the transportation service which it renders to the public; and that any reduction in its revenues will seriously embarrass and obstruct it in providing, and will deprive it of its power to properly provide, the facilities which the public commerce dependent upon it for transportation absolutely requires for the movement of traffic, both intra and interstate. This complainant is advised that no State has a right to require that its own commerce between points within the State shall be given a preferential service, or shall be carried at preferential and lower rates than other commerce. No State has a right to require such discrimination or partiality in favor of its own traffic. This complainant shows that the effect of the said rates proposed to be put into effect, pursuant to the acts of the General Assembly of North Carolina hereinbefore referred to, will be to destroy the proper adjustment of its intrastate rates in North Carolina to its interstate rates generally, and to its intrastate rates in other States, and to require that a preference shall be given by this

complainant, and an undue discrimination exercised by it, in favor of the intrastate traffic in North Carolina over the interstate traffic carried by this complainant, and over the intrastate traffic of this complainant in other States, and that to require such preference and such undue discrimination in regard to the intrastate traffic of the State of North Carolina would be to so regulate and burden interstate commerce as to violate the Commerce Clause of the Constitution of the United States, the benefit and protection of which this complainant respectfully sets up and claims.

13. That by section 3 of the above mentioned "Act in respect to Freight Rates" it is provided that whenever any person, firm or corporation intending to ship freight makes a written application to any railroad company for a car or cars to be loaded in car load lots with any kind of freight embraced in the tariffs of said Company, stating in such application the character of the freight, the number of cars wanted, the station, depot, siding, wharf or boat landing on the road or line of said railroad company whence the shipment is to be moved, and its final destination, the railroad company shall furnish said car or cars within four days from seven o'clock A. M. of the day following such application; which said application shall be delivered to the agent of the railroad company at the station at or nearest the point of shipment; and it is further provided that any railroad company failing to furnish the car or cars named in said written application shall be subject to a penalty of
31 five dollars per car per day, for each car not furnished, to be recovered by the person, firm or corporation making said application; but the Corporation Commission may excuse from the penalties imposed by this section independent lines not owned, operated, or controlled by any other line or system, where trackage is less than one hundred miles. The requirements of said statute are peremptory, and no exception is made in cases of inability of the carrier occasioned by wrecks or other accidents upon its road involving a detention of traffic, the breaking of bridges, accidental fires, washouts or other unavoidable consequences of heavy weather, and no exception in cases of a sudden congestion of traffic and actual inability to furnish cars by reason of their temporary and unavoidable detention in other States, or in other places within the same State, or in favor of the necessities of other classes of traffic, inter or intrastate. The complainant is advised that the said provision of the said act in respect to freight rates, is, therefore, a regulation of interstate commerce, and violates the commerce clause of the Constitution of the United States, the benefit and protection of which, in this regard, is here again expressly set up and claimed.

14. That by the said "Act in respect to Freight Rates" it is provided that any railroad company doing business in the State of North Carolina, or officer or agent thereof, who shall make charges for shipments of freight in violation of the provisions of said act, shall be deemed guilty of a misdemeanor, and such corporation shall, upon conviction, be fined not less than one hundred dollars, and such officer or agent shall be fined or imprisoned, or both, in the discretion of the court. And by the said "Act in respect to Pas-

senger rates" it is provided that any railroad company violating any provision of the act shall be liable to a penalty of five hundred dollars for each violation, payable to the person aggrieved by such violation, and recoverable in an action to be instituted in the name of said person in any court of North Carolina having competent jurisdiction thereof, and any agent, servant or employee of any railroad company violating said act, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. This complainant is advised that the effect of said act is, in addition to the punishment of the officer, servant, agent or employee for a misdemeanor, to impose this upon this complainant for each shipment of freight, at a greater rate than is allowed by the said act in respect thereto, a fine of one hundred dollars, and for each sale of a passenger ticket, at a rate greater than is allowed by the said act in respect
31½ to passengers, a fine of five hundred dollars. An effort is thus made to prevent by these enormous penalties, which are in their nature confiscatory of this complainant's property, any inquiry into the validity of these particular statutes, and to so burden any challenge thereof in the courts that this complainant and the others affected thereby must necessarily submit, rather than take the chances of the penalties imposed, and this complainant is advised that the effect of these penalties and of the legislation which imposes them is, because no other person or business in North Carolina is subjected to such penalties under similar circumstances, to deprive this complainant of the equal protection of the laws, and, moreover, is a denial to this complainant of due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which this complainant respectfully sets up and claims.

15. That by said section 3 of "said act in respect to passenger rates" it is provided that mileage books of one thousand miles in each book shall be kept on sale at such railroad ticket offices in North Carolina as shall be named and designated by the Corporation Commission of North Carolina, and when any such mileage book is purchased it shall be good in the hands of any person or persons named therein on all railroads on which the fare is the same as, or less than, the fare on the road of the company selling such mileage book; and, when the mileage is detached from said book by any other railroad company than the one which sold it, the said mileage shall be redeemable on demand by the railroad company which sold it. This complainant is advised that the effect of said provision is to require this complainant to accept and to carry out, the contracts of other railroad companies as embraced in said mileage book tickets and to permit some other railroad company to collect money for the price of transportation which this complainant by said law will be required to furnish, and is, moreover, to constitute this complainant, without its consent, the agent of other railroad companies for the purpose of sale of tickets and the receipt and accounting for the price thereof. This complainant is further advised that while it may be the proper interpretation of said provision, that it may limit in point

of time the mileage tickets which it issues, there is no power given to this complainant to limit, in point of time, the mileage books issued by other carriers which, by the terms of said act, it is required to redeem without reference to the length of time the same might be outstanding. This complainant is advised, and here shows to
32 the court, that the said provisions of section 3 mentioned in this paragraph are unreasonable regulations, as applied to this complainant and its business, and deprives it of its property right of management of its own property and, by seeking to impose upon it unreasonable burdens, deprives it of the proper use of its property without due process of law and also deprives it of the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, the benefits and protection of which this complainant respectfully sets up and claims.

16. This complainant further shows that there is no just reason for making a rule for some of the railroads different from that made for the Complainant, in respect to their freight rates, and in respect to demurrage charges, and that there is no reasonable basis for such difference; and there is likewise no just reason for the difference in rates in the said "Act in respect to Passenger Rates" made in favor of roads in said State whose mileage is sixty miles or under over other railroads, and in favor of railroads constructed within twelve months preceding the first day of January, 1907, or at that time in course of construction, and such railroads as may be constructed within two years from January 1st, 1907, over other railroads. Each of the carriers in said State of North Carolina is, under the Constitution of the United States, entitled to charge a reasonable compensation for the service rendered, and no difference in classification can be made arbitrarily by length of road merely for the purpose of allowing one carrier to charge more than another for the same or similar service. This complainant is, therefore, advised that the effect of said acts in making such difference in classification and in permitting one carrier to charge for the same service in North Carolina a greater sum than is permitted to another carrier in North Carolina is to deprive this complainant of the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, which this complainant, in this regard, here again respectfully sets up and claims.

17. The complainant further shows that the Corporation Commission of North Carolina is required by the said "Act in respect to Freight Rates" to prepare and publish, before the same go into effect, the tariff of rates, charges and tolls to be charged and collected by railroad companies in the State of North Carolina, as authorized by said act, and by the said "Act in respect to Passenger Rates" it is required to publish, before the same go into effect, the rates
33 fixed by the said act for the several railroad companies operating in the State of North Carolina, and the Corporation Commission of North Carolina is further required by the law of North Carolina, if this complainant, in its opinion, violates the said "Act in respect to Freight Rates," or the said "Act in respect to

Passenger Rates," and charges a rate in excess of the amount permitted by such acts respectively, to give notice in writing to this complainant of such violation, and, if such charge in excess of the rates fixed by said acts is continued after such notice, said commission is required to present the facts forthwith to the Attorney General, and the said Attorney General and the said Assistant Attorney General are required to take such proceedings thereon as they may deem expedient; and this complainant says that, unless prevented by the injunction of this Honorable Court, the said Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, constituting the Corporation Commission of the State of North Carolina, will, for the purpose of putting the same into effect, make up and publish said tariff of freight rates as provided by said "Act in respect to Freight Rates," and will undertake to classify your complainant and the other carriers in North Carolina in accordance with, and will publish the passenger rates prescribed by, said Act in respect to Passenger rates," and will, in case this complainant exercises its constitutional right to make charges in excess of the rates fixed by said acts respectively, proceed against this complainant for a violation thereof, and the said Robert D. Gilmer, Attorney General, and the said Hayden Clement, Assistant Attorney General, will, in such case, proceed to impose the penalties prescribed by said act on this complainant therefor.

The complainant further shows that, unless this Court takes jurisdiction of and determines the question of the constitutionality and validity of said statutes and affords complainant relief in respect thereto in this cause, the number of actions for penalties to which it will be thus exposed and which will be thus instituted against it, will be enormous, and it will be very difficult, if not practically impossible, to show in defence of each of said actions and prosecutions, what the effect upon the Complainant's revenues would be of the proposed reductions in its freight and passenger rates or such effect in respect to each particular article of freight and each particular passenger; and in any event, it would be seriously and unjustly burdensome and expensive to the complainant to be subjected to the great multiplicity of suits and prosecutions for penalties to which it would be subjected if relief herein is not granted, and to be
34 obliged to produce in each and all of said suits and prosecutions the necessary evidence to show that said freight tariff and said passenger tariff are unreasonable and unjust and are confiscatory of your complainant's property; and the pendency of such suits, involving in the aggregate such enormous amounts of penalties would depreciate the value of complainant's property and the value of its stocks and bonds and would greatly impair its credit and consequently its ability to perform the public service required by the commerce tributary to its lines, and would inflict great and irremediable injury and damage, not only upon the complainant and upon the holders of its stocks and bonds, but also upon the shipping and travelling public. The complainant avers that in all the multitude of actions and prosecutions referred to the same question

would be involved, and that that question is involved, and can be tried and its merits fairly determined in this cause.

18. The subject matter of this suit now brought before this Honorable Court is a controversy between citizens of different States, and the amount involved herein, exclusive of interest and costs, exceeds the sum or value of $2,000, and this suit also involves questions arising under the Constitution of the United States, and rights asserted by the Complainant under said Constitution and protected thereby.

19. The complainant shows to the court that its purpose in this cause is, by an orderly proceeding in the courts, to obtain a judicial determination of its rights under the Constitution of the United States, and, if, as it is advised and believes, its just rights in the premises are imperilled, denied and encroached upon by the several acts of the General Assembly of North Carolina hereinbefore complained of as contrary to the Constitution of the United States, then to obtain a judicial decree establishing and protecting the rights of this complainant, and to that end it is essential, as alleged in this bill, that an injunction shall be issued; but this complainant does not desire in any way injuriously to affect any lawful right of the State or of the people of North Carolina, or of any other person, and hereby complainant offers and undertakes to do all in its power to maintain the *status quo* during the course of this judicial inquiry, and accordingly it consents, and it prays the court, that there may be and shall be adopted herein a proceeding analogous to that provided by section 7 of the Corporation Commission Act of North Carolina, namely, the execution of a bond by the complainant
35 conditioned to pay into the registry of this court, from time to time, when and as the court may so order, such sum and sums of money as shall be equal to the difference between the aggregate freight and passenger rates charged and received by it, and those fixed in or under the said acts of Assembly, and that, as an incident thereto, the complainant shall give to any person purchasing a ticket for travel on its lines in the State of North Carolina a transferable coupon, or other written evidence, representing the sum to which such person, or his transferee, will be entitled upon a final decision upholding the constitutionality of such laws, such coupons, or the amount covered by such other written evidence, in that event to be payable out of the cash deposit in the registry of this court; and that this complainant, from time to time, shall report to the court at intervals to be fixed by the order of the court herein, statements showing the amount of such passenger fares and of the freights by it charged and collected, and of the names of the shippers of such freights, and that from time to time the complainant shall give such further bond or bonds as the court may require to secure the proper payment into court of all amounts which finally it shall be adjudged that it should repay, or reimburse, under the final decision of this court, or upon final review thereof; and that on a final determination herein that this complainant is entitled to the amounts covered by said bond or bonds, that the said bonds be released and canceled by the court, and, if any amounts shall have been paid into the registry

of the court pursuant thereto that, upon such determination in favor of the complainant, the sum or sums so paid into the registry shall be repaid to the complainant without further order of the court herein.

20. Complainant avers that it will be irremediably injured unless an injunction be granted as hereinafter prayed, and relief be given to it in this suit.

In consideration whereof, and forasmuch as your complainant is remediless in the premises under the rules of the common law and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable, and to the end, therefore, that the defendants hereinafter named may answer the several matters and things hereinbefore set forth as fully and particularly as if the same were again here repeated, and they were thereunto specially interrogated, but not under oath, answer under oath being expressly waived, the complainant prays that the
36 said defendants be required so to answer, and that an injunction may be issued out of this court enjoining and prohibiting the defendants Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, constituting the Corporation Commission of North Carolina, and each of them individually, and jointly as constituting the said Corporation Commission of North Carolina, and each and all of their successors in office, from preparing and publishing the tariff of rates, charges and tolls mentioned in said act in respect to freight rates, and from classifying the railroads operating in North Carolina in accordance with, and from publishing the rates fixed by said act in respect to passenger rates, and from taking any steps, under or in pursuance of the said act of the General Assembly of North Carolina entitled "An Act to prevent unjust discrimination in Freight Rates and to fix maximum charges therefor," ratified March 9, 1907, or under said act of the General Assembly of North Carolina entitled "An Act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina," ratified March 2, 1907, and from taking any step in pursuance of any of the laws of the State of North Carolina, either directly or through the said defendant Robert D. Gilmer, Attorney General, or Hayden Clement, Assistant Attorney General, or by or through any other attorney at law, or otherwise, to enforce either of said Acts or the penalties therein prescribed, or any other penalties against the complainant, or against any of its officers, agents, or employees, for failure to put into effect or to observe on any of the lines of complainant in North Carolina the said freight rates or the said passenger rates required by either of said Acts, and enjoining the defendants Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, each and every of them, and their and each of their successors in office, from taking any step under the laws of North Carolina, by themselves or through any other attorney at law, or otherwise, for the purpose of enforcing either of said Acts or any of the penalties thereby prescribed, or any other penalties against the complainant or against any of its officers, agents or employees, for failure to put into effect, or to comply with either of the

said Acts of the General Assembly of North Carolina or any of the provisions thereof, and enjoining each and all of said defendants, their servants or agents, from instituting or bringing, or causing to be instituted or brought, as aforesaid, any suit, either at law or in equity, against your complainant, or against any officer, agent or employee of your complainant, compelling your complainant, or any of its officers, agents or employees to put into effect, or observe,
37 either of said Acts, or any provision thereof, and enjoining and prohibiting the said Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, and each of them, and their successors in office, and each and every other attorney at law that may be employed or appointed by the said Corporation Commission of North Carolina, or by the said Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, Railroad Commissioners, or either of them, or by any other officer of the State of North Carolina, from bringing or prosecuting any action or proceeding, civilly or criminally, against your complainant, or any of its officers, agents or employees, for penalties or fines or damages, or for any cause of action whatsoever, for failure to put into effect on any of the said lines of railway of the complainant in North Carolina any of said tariffs, passenger or freight, or for failure to observe said Acts or either of them, or any provision of either, and from instituting or bringing, or causing to be instituted or brought, any suit at law or in equity, for penalties or otherwise, against the complainant or any officer or agent of the complainant, for charging more for freight or passenger transportation than is provided by said Acts, or so as in any way to prevent or hinder the complainant from increasing its freight and passenger charges, to the extent that such increase may be fair, reasonable and just, and enjoining and prohibiting all other individuals, persons or corporations from instituting or prosecuting any suit or suits against the complainant, or against any officer, agent or employee of the complainant, for the recovery of any damages or overcharges, or for the recovery or imposition of any penalty or penalties, under or by virtue of said Acts or either of them, or under or by virtue of any other law of North Carolina, because of or growing out of the failure of the complainant or any of its officers, agents or employees, to put into effect, or observe, any of the provisions of said Acts, or either of them; and that the said tariffs, freight and passenger, prescribed by said Acts, and each and every of the provisions of said Acts, and of each of them, be declared to be unreasonable, unfair and unjust to the complainant, and unconstitutional, null and void.

That in the meantime, and until a decision can be had upon your complainant's motion for the injunction herein prayed, a restraining order may be granted, restraining the acts sought herein to be enjoined, your complainant hereby averring that there is danger of irreparable injury from delay if action should not be taken until such motion for an injunction can be tried upon its merits.

That a writ of injunction be issued, etc., commanding, etc., enjoining the defendants as above prayed.

38 That on a final hearing said injunction as herein prayed may be made perpetual; that the said Act ratified March 9, 1907, and the said Act ratified March 2, 1907, providing for said freight and passenger tariffs, respectively, may each of them be declared null and void by a decree of this court, so far as the same relate to any of your complainant's said lines of railroad in North Carolina, or to any of its business, and that your complainant may have such other and further relief as in justice it may be entitled to, and as to equity is meet.

That this complainant may have leave to make, by supplemental process, as new parties defendant, as occasion may require, any person or corporation who may appear asserting against this complainant, or against any of its officers, agents or employés, any alleged right or remedy under either of said acts, or otherwise, because of the failure of the complainant, or any of its officers, agents or employés, to put into effect, or to observe, any rate mentioned in either of said acts or any other provision of said acts, or either of them.

May it please your Honors to grant unto your complainant the temporary restraining order aforesaid, the writ of injunction aforesaid, and the writ of subpœna addressed to said defendants Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, individually, and as constituting the Corporation Commission of North Carolina, and Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, commanding said defendants, under a penalty therein named, to appear in this court, on some certain day, to be thereby fixed, to answer the premises and abide by and perform such decree as may be passed herein, but said answer as above stated not to be made on oath, answer under oath being expressly waived.

This is the first application by your complainant for a restraining order or injunction in this case.

SOUTHERN RAILWAY COMPANY,
Complainant,
By J. M. CULP, *Vice President.*

CLAUDIAN B. NORTHROP,
W. B. RODMAN,
Solicitors for Complainant.
FRANCIS LYNDE STETSON,
ALEX. P. HUMPHREY,
WALKER D. HINES,
ALFRED P. THOM,
Of Counsel.

39 UNITED STATES OF AMERICA, *District of Columbia, To wit:*

Personally appeared before me, Pearce Horne, a Notary Public, duly commissioned, qualified and acting as such in and for the District of Columbia, J. M. Culp, who, upon being first duly sworn deposes and says:

That he is Vice President of the Southern Railway Company, the complainant in the foregoing bill of complaint; that he has personal supervision of the traffic of said Company; that he has read the foregoing bill and knows the contents thereof; that the facts therein stated, as of complainant's own knowledge, are true; and that the facts therein stated upon complainant's information and belief, he believes to be true.

J. M. CULP.

Sworn and subscribed to before me this 7th day of May in the year 1907.

My commission as Notary Public expires on the 17th day of January, 1911.

In witness whereof I have hereunto signed my name and affixed my notarial seal at the city of Washington in the District of Columbia, this 7th day of May in the year 1907.

[SEAL.] PEARCE HORNE,
Notary Public.

40 EXHIBIT No. 1.

AN ACT

AUTHORIZING THE PURCHASERS OF THE RICHMOND AND DANVILLE RAILROAD, THEIR ASSIGNS AND SUCCESSORS, TO BECOME AND BE A CORPORATION, TO ADOPT A NAME THEREFOR, AND TO POSSESS AND EXERCISE GENERAL POWERS; AND AUTHORIZING THE LEASING TO OR BY, AND THE CONSOLIDATION THEREWITH OF, OTHER CORPORATIONS.

[Approved February 20, 1894.]

Whereas, a certain suit in equity is now pending in the Circuit Court of the United States of America for the Eastern District of Virginia, wherein the Central Trust Company of New York is complainant, and the Richmond and Danville Railroad Company, a corporation created by and existing under the Laws of the State of Virginia, is defendant, in which suit it is sought to foreclose the consolidated mortgage, dated the twenty-second day of October, in the year one thousand eight hundred and eighty-six, and upon or about that day duly executed, acknowledged and delivered by said railroad corporation to said Central Trust Company of New York, and subsequently supplemented and confirmed by said railroad corporation by instruments dated November first, eighteen hundred and eighty-six, and April thirtieth, eighteen hundred and eighty-eight, respectively, in which suit also it is proposed to sell the whole of the mortgaged property and premises, being the rights, property, privileges and franchises of the said the Richmond and Danville Railroad Company.

And, whereas, it is deemed desirable and for the interest of this Commonwealth that the said railroad property shall be sold and

reorganized in such manner and under such conditions as to secure the largest and best possible facilities and advantages of transportation and communication for the people of this State; now, therefore:

1. *Be it enacted by the General Assembly of Virginia,* that the purchaser or purchasers of the said mortgaged premises of the said the Richmond and Danville Railroad Company at the foreclosure sale thereof in the course of the said suit in equity, and such person or persons as he or they may associate with himself or themselves, shall forthwith be, and they hereby are, constituted a body politic and corporate by the name which they may select, as set forth in the conveyance of said mortgaged premises, or in any writing signed by him or them and recorded in the court in which the said conveyance shall be recorded, and such new corporation shall have, possess and be invested with all the estate, right, title and interest in and to such railroad and other property, with their appurtenances, and all the franchises, rights and privileges had and pos-
41 sessed by the said Richmond and Danville Railroad Company to the same extent as a purchaser under sections twelve hundred and thirty-three and twelve hundred and thirty-four of the Code of Virginia, and shall perform all the duties prescribed by said sections of said Code; provided, however, that said new corporation shall not be limited as to the amount or classification of its stock or bonds, except that the total amount of stock issued shall not exceed three hundred and fifty million dollars, and shall have no immunity from any lawful State, county or municipal taxation by reason of its former charter or any law heretofore exempting it from taxation.

2. Such purchaser or purchasers may associate with him or them any number of persons in the organization of the new corporation, which may create and issue its stock and its bonds secured by mortgage or otherwise, according to any plan adopted by such purchaser or purchasers, and filed as hereinafter provided.

3. It shall be the duty of such new corporation within six months after the conveyance to it of said mortgaged premises to execute a certificate in writing under its common seal attested by the signature of its President or Vice-President, referring to the sale and conveyance by which it shall have acquired title to such premises and the plan of organization adopted by the purchasers, the amount and classes or kinds of capital stock and mortgage bonds or other obligations authorized to be issued, and also specifying the name of such new corporation and of its President, and the number and names of its Directors, which certificate shall be filed in the office of the Secretary of the Commonwealth of Virginia, and a certified copy thereof shall be conclusive evidence of the existence of such new corporation.

4. In addition to its other powers, such new corporation shall have, and from time to time as occasion arises may exercise, the following powers, or any of them, namely:

(*a*) With the approval of a majority of its stockholders, given at a meeting, it may, from time to time, lease, use, operate, consolidate with, or purchase or otherwise acquire, or be leased, used, operated

by, or consolidated with, any railroad or transportation company now or hereafter incorporated by the laws of the United States, or any of the States thereof, or any one or more of such railroad or transportation companies, or any other railroad or transportation company or companies which now are or hereafter may be leased, or used, or operated by, or consolidated with any one or more of such railroad or transportation companies; and, from time to time, it may consolidate its capital stock, property and franchises, by change of name or otherwise, with the capital stock, property and franchises of any other railroad or transportation company, power being hereby granted to any railroad or transportation company or companies incorporated by or under any act or acts of the General Assembly of the State of Virginia, with the approval of a majority in amount of its or their shareholders respectively given at any meeting, to make and carry out such contracts of consolidation, or lease, sale or other method of acquisition; *provided* that, in all con-
42 solidations, a copy of the agreement therefor shall be filed in the office of the Secretary of the Commonwealth of Virginia, and that any corporation with which said new corporation may consolidate, or which it may lease, shall be or remain subject to the jurisdiction of the courts of this State, and all lines of railroad operated by it in the State of Virginia shall be subject to the general laws of the State; and *provided, further,* that any stockholder who dissents from any such consolidation may within sixty days thereafter apply by petition to the Circuit Court of the City of Richmond to determine the value of his stock, and shall be entitled to receive from the new corporation the value as thus determined of such stock upon transfer thereof to the new corporation.

(*b*) It may from time to time purchase, own and hold bonds or other evidences of debt, and shares of the capital stock of any railroad company or companies formed under the laws of this or any other State, and from time to time may guarantee or assume the bonds, evidences of indebtedness or capital stock of any such railroad company.

(*c*) It may from time to time acquire or guarantee the stocks and bonds, or either, of any inland, coast or ocean transportation company or companies, operating to or from any point or points on its lines; and it may develop or aid in the development of its business, by acquiring or guaranteeing the stocks and bonds, or either, of hotel, lighterage, wharf, elevating and other such enterprises convenient in connection therewith or as part thereof.

5. Said new corporation may issue its capital stock of one or more classes or kinds, and in one or more series or grades, with such preferences, conditions and voting power as shall be provided in said plan of organization, and, from time to time, it may increase or decrease the amount of any class or kind or grade of such stock as shall be provided in said plan of reorganization, or with the approval of a majority in amount of the stockholders, given at a meeting of stockholders called for that purpose, unless and except as otherwise expressly provided in certificates representing stock previously issued. The shares of each class of stock shall be of such

par amount, and shall entitle the holders to such vote, respectively, as shall be determined in the said plan of reorganization, or by the stockholders in like manner.

6. Such new corporation may borrow money and issue bonds or other evidence of indebtedness therefor, and may secure the same, from time to time, by mortgage or deed of trust upon any or all of its property and franchises, and such new corporation, from time to time, may issue and sell its bonds and its capital stock at such prices and on such terms as shall be specified in said plan of organization, or as a majority in amount of the stockholders shall approve at any meeting, and may receive in payment therefor property, securities or shares in any corporation mentioned in this act, and any stock so issued shall be deemed fully paid and free from any liability.

43 7. The business, property and concerns of said corporation shall be managed by a Board of Directors consisting of not less than five members, and one of their number shall be chosen as President. The stockholders may adopt by-laws for the government of the stock, property and concerns of the corporation, and for the regulation of its directors, officers and agents, and in and by such by-laws the stockholders may prescribe how such by-laws may be amended or repealed; provided, however, that until such by-laws shall be adopted by the stockholders the corporation shall be governed by by-laws adopted in accordance with the plan of organization.

8. The principal office of the Company shall be in the City of Richmond, in this State, at which all meetings of the stockholders shall be held; and all other offices and workshops of said Company shall be located in the State of Virginia, as far as the same may be practicable.

9. It shall be lawful for the Circuit Court of the City of Richmond, upon the petition of the President and Board of Directors, at any time to order a change in the name of the Company; but any such change of name shall be without prejudice to the rights of any creditor, or to the exercise of any of the powers and privileges granted by this act.

10. There shall be paid to the Clerk of the county or corporation in which any mortgage authorized by this act may be presented for recordation, the existing rate of taxation for such recordation upon the assessed value of the road-beds, depots, station buildings and lots, and machine shops, fixtures and rolling stock, and any real estate not included in said enumeration, in the State of Virginia, conveyed in such mortgage; and upon presentation to the Clerk of the county or corporation where it is proposed to record said mortgage of a certificate of the Auditor of the State of the amount of the assessed values of the said property within the State of Virginia, and upon the payment of the tax thereon to the said Clerk, the said mortgage shall be recorded without other charge than the clerical fees provided in such cases. Certified copies of such mortgage may be recorded in any county of Virginia in which property covered by such mortgage may be located upon payment of clerical fees.

11. All taxes and debts due or to become due the State of Virginia

by the corporation shall be paid in lawful money of the United States, and not in coupons.

12. This act shall be in force from its passage.

A true copy.

Teste:

____ ____,
Clerk of the House of Delegates and Keeper of the Rolls of Virginia.

Date, ——, —.

44 SOUTHERN RAILWAY COMPANY.

Certificate.

STATE OF VIRGINIA, *City of Richmond, ss:*

Southern Railway Company, a corporation organized and existing under and pursuant to the provisions of an Act of Assembly of the State of Virginia, approved February 20, 1894 (of which act a copy, marked "Schedule D," is hereunto annexed and made a part of this certificate), entitled—

"An Act authorizing the purchasers of the Richmond and Dan-"ville Railroad, their assigns and successors, to become and be a "corporation, to adopt a name therefor, and to possess and exercise "general powers; and authorizing the leasing to or by, and the con-"solidation therewith of, other corporations,"

in conformity to the requirements of Section 3 of the said act, does hereby certify as follows, viz:

First. The said Southern Railway Company, upon June 18, 1894, did acquire title to the rights, property, privileges and franchises of the Richmond and Danville Railroad Company embraced in and covered by its consolidated mortgage to the Central Trust Company of New York, dated October 22, 1886, under and by means of the following sale and conveyance, viz:

(1) *The sale of the said mortgaged premises* was held in the City of Richmond, on the 15th day of June, 1894, under a decree of foreclosure and sale entered on the 13th day of April, 1894, in a certain suit in equity pending in the Circuit Court of the United States of America for the Eastern District of Virginia, wherein the Central Trust Company and others were complainants and the Richmond and Danville Railroad Company was defendant, in which suit it was sought to foreclose the said consolidated mortgage, and also to sell the whole of the mortgaged property and premises, being the rights, property, privileges and franchises of said the Richmond and Danville Railroad Company, at which sale the mortgaged premises were bid in by and struck off to Charles H. Coster and Anthony J. Thomas, a Purchasing Committee, as purchasers thereof, with the intent and for the purpose of vesting the same in the said Southern Railway Company thereafter to be organized by the said purchasers and their associates, pursuant to the laws of the State of Virginia.

(2) *The conveyance of the said mortgaged premises* was made pursuant to the order of the Circuit Courts of the United States of America, by the Special Masters in said suit, Matthew F. Pleasants, Thomas S. Atkins and Charles Price, upon the 18th day of June, 1894, to the said Charles H. Coster and Anthony J. Thomas, as Purchasing Committee for the benefit of the said Southern Railway Company, such conveyance having been duly recorded on the
45 said 18th day of June, 1894, in the Chancery Court of the City of Richmond, in the State of Virginia.

Second. *The plan of organization adopted by the purchasers* is that of which a copy is hereunto annexed, marked "Schedule B" and made part of this certificate.

Third. *The amount and classes or kinds of capital stock* already authorized to be issued by the new corporation (subject to increase up to but not exceeding the limit prescribed by said act) were and are:

One million two hundred thousand shares of common stock, and six hundred thousand shares of preferred stock, each and every of such shares being of the par value of one hundred dollars each, and the aggregate par value of such shares being one hundred and eighty million dollars.

The preferences, conditions and voting power of such capital stock are as set forth in the said plan of organization hereunto annexed, marked "Schedule B."

Fourth. *The amount and classes or kinds of mortgage bonds or other obligations heretofore* authorized to be issued by said corporation are bonds secured by mortgage payable as therein specified, and, except as and when registered as therein provided, being negotiable instruments, passing by delivery, free from any and all defences against the holder thereof, such bonds having been authorized to the amount of one hundred and twenty-four million five hundred thousand dollars, including what are known as its *"East Tennessee Reorganization Mortgage Bonds,"* for the aggregate amount of $4,500,000, and its *"First Consolidated Mortgage Gold Bonds,"* for the aggregate amount of $120,000,000, of which last-mentioned bonds a large part are not now to be issued, but are reserved for various purposes mentioned in the mortgage securing said bonds, dated October 2, 1894, and duly recorded November 9, 1894, in the office of the Clerk of the Chancery Court of the City of Richmond, in the State of Virginia, and also in other offices; and among other purposes for the redemption and payment in due course of the bonds of the Richmond and Danville Railroad Company, secured by its two mortgages to Central Trust Company of New York, as Trustee, dated respectively October 5, 1874, and February 1, 1882, such last-mentioned mortgage having been amended by agreement dated July 24, 1894, between the said Central Trust Company and the said Southern Railway Company, a part of the mortgaged premises first above mentioned having been sold and purchased subject thereto, and such bonds have been and are assumed by the Southern Railway Company; and also for the payment and redemption in due course of the said *"East Tennessee Reorganization Mortgage Bonds,"* and also

for the redemption and payment on July 1, 1909, of such of the first mortgage bonds of the Charlotte, Columbia and Augusta Railroad Company as shall have been extended in accordance with the provisions of an agreement made July 5, 1894, between the Southern Railway Company and the Maryland Trust Company, the holders of all such extended bonds then outstanding being entitled to exchange the same at par for like amount of the said First Con-
46 solidated Mortgage Bonds, interest to be adjusted properly at the time of every such exchange.

"Schedule A," hereunto annexed, is a list of the properties now embraced in the Southern Railway System, and is also a statement of bonds and obligations issued or assumed by or chargeable upon property purchased by Southern Railway Company under its said charter, "Schedule D," and showing the letter date of issue, number of bonds, amount of issue, rate of interest, and when and where payable; the only bonds issued directly by Southern Railway Company being those issued under the two mortgages first above mentioned, dated October 2, 1894.

Fifth. The name of the new corporation is "Southern Railway Company," and the name of its President is Samuel Spencer.

Sixth. The Directors of the new corporation are nine in number, and their names are:

Aubin L. Boulware, Richmond, Va.
Charles H. Coster, New York, N. Y.
Harris C. Fahnestock, New York, N. Y.
Thomas F. Ryan, do.
Samuel Spencer, do.
Anthony J. Thomas, do.
Samuel Thomas, do.
Skipwith Wilmer, Baltimore.
*J. Hood Wright, New York.

In witness whereof, the said Southern Railway Company has executed this certificate under and by its common seal, attested by the signature of its President, this fourth day of December, 1894.

SAMUEL SPENCER,
President of the Southern Railway Company.

[Seal of Southern Railway Company.]

Attest:
W. A. C. EWEN, *Secretary.*

STATE OF NEW YORK, *City and County of New York, ss:*

I, George H. Corey, a Commissioner of Deeds for the State of New York, thereto duly appointed by the Governor of the State of Virginia, and a Notary Public for the said City and County of New York, thereto duly appointed by the Governor of the State of New York, do hereby certify that Samuel Spencer, whose name is signed to the foregoing and hereto annexed certificate bearing date the fourth day of December, 1894, as President of the Southern Railway

*A vacancy exists because of Mr. Wright's death, November 12, 1894.

Company, with whom I am personally acquainted, and who is personally known to me to be the President of the Southern Railway Company, the corporation described in and which executed the said certificate, personally appeared before me at my office in my said County and corporation, for himself and on behalf of the Southern Railway Company, and being informed of the contents of the
47 said certificate, he did on this day acknowledge the due execution of the foregoing certificate on the day the same bears date; and further acknowledged that he voluntarily executed, signed and sealed the said certificate as his free act and deed, and as the free act and deed of the said Southern Railway Company, for the purposes and uses therein mentioned.

And the said Samuel Spencer, being by me first duly sworn did depose and say: That he resides in the City of New York, in the State of New York; that he is the President of the Southern Railway Company; that he knows the corporate seal of the said Company; that the seal affixed to the foregoing instrument is the corporate seal of the said Company, and was thereto affixed by authority of the Board of Directors of the said Company, and that he signed his name thereto by like authority as President of said Company.

In witness whereof, I have hereunto set my hand and seals of office as Commissioner of Deeds for the State of Virginia and as Notary Public for the City and County of New York, in the State of New York, at my office, this fourth day of December, 1894.

[Seal of George H. Corey, Commissioner for Virginia.]

GEO. H. COREY,
Commissioner for the State of Virginia in New York.

[Seal of George H. Corey, Notary Public, New York.]

GEO. H. COREY,
Notary Public for the City and County of New York in the State of New York.

STATE OF NEW YORK, *City and County of New York, ss:*

I, Henry D. Purroy, Clerk of the City and County of New York, and also Clerk of the Supreme Court in said City and County, the same being a court of record do hereby certify that George H. Corey, whose name is subscribed to the certificate of acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment a Notary Public in and for the City and County of New York, dwelling in the said City, commissioned and sworn, and duly authorized to take the same and to administer oaths; and, further, that I am well acquainted with the handwriting of said Notary Public, and verily believe that the signature to the said certificate of acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 12th day of December, 1894.

[Seal of the Supreme Court, City and County of New York.]

HENRY D. PURROY, *Clerk.*

48 "SCHEDULE A."

(*a*) LINES OF WHICH THE OWNERSHIP HAS BEEN ABSOLUTELY MERGED INTO THE SOUTHERN RAILWAY COMPANY (OR THE COMPANIES OF LIKE NAME IN KENTUCKY AND MISSISSIPPI) BY PURCHASE AT FORECLOSURE OF BY OTHER CONVEYANCE:

Richmond, York River & Chesapeake	about	39.	miles.
Richmond & Danville	"	145.53	"
Piedmont	"	48.	"
Washington, Ohio & Western	"	50.12	"
Western North Carolina	"	307.	"
Statesville & Western	"	20.36	"
Northwestern North Carolina	"	100.15	"
Clarksville & North Carolina	"	7.03	"
Oxford & Clarksville	"	49.32	"
Oxford & Henderson	"	12.94	"
Atlantic, Tennessee & Ohio	"	.44	"
Charlotte, Columbia & Augusta	"	190.53	"
Columbia & Greenville	"	164.98	"
Georgia Pacific	"	552.	"
East Tennessee, Virginia & Georgia	"	1,254.40	"
Louisville Southern	"	123.88	"
			3,109.24 miles.

(*b*) OPERATED LINES OF WHICH ALL OR NEARLY ALL THE STOCK IS OR IS EXPECTED TO BE OWNED BY SOUTHERN RAILWAY COMPANY:

Virginia Midland* and branches (leased)	about	400.70	miles.
High Point, Randleman, Asheboro & Southern (all bonds also owned)*	"	27.51	"
North Carolina Midland (all bonds also owned)*	"	26.11	"
Elberton Air Line (all bonds also owned)*	"	50.36	"
Roswell	"	9.11	"
Yadkin*	"	41.17	"
State University (no bonds issued)	"	10.20	"
			565.46 miles.

*MEMO.—It is intended, later on, to bring about a conveyance of these lines to he Southern Railway Company.

49 (*c*) LEASED LINES:

North Carolina Railroad.....	about 223.20 miles.	
Atlanta & Charlotte.....	" 268.54 "	
		491.74 miles.

(*d*) LINES OPERATED UNDER VARIOUS ARRANGEMENTS:

Lawrenceville (all bonds and majority of stock owned, but line is of no value and has been discontinued)..	9.61 miles.	
Richmond & Mecklenburg (all second mortgage bonds and most of stock owned)	31.45 "	
Asheville & Spartanburg, and Spartanburg, Union & Columbia (operated temporarily for account of first mortgage bondholders).....	133.90 "	
		174.96 "
(*e*) KNOXVILLE & OHIO RAILROAD (nearly all the stock owned)		66.00 "
(*f*) BALTIMORE, CHESAPEAKE & RICHMOND STEAMBOAT LINE (all the stock and all certificates of debt owned).....		200.00 "
Total mileage.....		about 4,607.40 miles.

(*g*) LINES OPERATED INDEPENDENTLY IN WHICH SOUTHERN RAILWAY COMPANY IS INTERESTED AS BONDHOLDER:

Danville & Western.....	about 70. miles.	
Chester and Lenoir, north end..	" 33. "	
Blue Ridge (believed to be of no value).....	" 34.02 "	
Laurens (believed to be of no value).....	" 29.90 "	
Milton & Sutherlin (believed to be of no value).....	" 6.50 "	
Hartwell	" 10.10 "	
		183.52 miles.
Grand total.....		about 4,790.92 miles.

"SCHEDULE A"—*Continued.*

SOUTHERN RAILWAY COMPANY.

Outstanding Mortgage and Obligations.

Principal and Interest payable, except as otherwise specified, in the City of New York.

Name of railroad company.	Description of bond or obligation.	Due.	Int.	Amount.
	A.			
	On properties merged into Southern Railway Company.			
Richmond & Danville	Consolidated gold 6 %	Jan., 1915	J & J.	$5,997,000.00
do.	Debenture 5s (formerly 6s), earliest coupon April, 1896	April, 1927	A. & O.	3,368,000.00
do.	Equipment S. F. gold 5 % (1)	Sept., 1909	M. & S.	1,194,000.00
do.	Equipment Notes	Various		507,835.00
Richmond, York River & Chesapeake	First Mortgage 5 %	Jan., 1910	J. & J.	400,000.00
do. do.	Second Mortgage 4½ %	Nov., 1910	M. & N.	500,000.00
Washington, Ohio & Western	First Mortgage 4 %	Feb., 1924	F. & A.	1,025,000.00
Atlantic, Tennessee & Ohio	First Mortgage 6 %	April, 1913	A. & O.	150,000.00
Western North Carolina	First Mortgage gold 6 %	July, 1914	J. & J.	2,531,000.00
Charlotte, Columbia & Augusta	First Mortgage gold 7 %, due January 1, 1895, extended at 5 % to July, 1909	July, 1909	J. & J.	2,000,000.00
do. do.	Second Mortgage 7 %, earliest coupon October, 1895	Oct., 1910	A. & O.	500,000.00
Columbia & Greenville	First Mortgage gold 5 % to January, 1898, 6 % thereafter	Jan., 1916	J. & J.	2,000,000.00
Georgia Pacific	First Mortgage gold 5 % to January, 1898, 6 % thereafter	Jan., 1922	J. & J.	5,660,000.00
do.	Equipment S. F. gold	Various	F. & A.	787,000.00
do.	Equipment Notes	Various		359,005.54
East Tennessee, Virginia & Georgia	Divisional Mortgage 7 %	July, 1900	J. & J.	3,123,000.00
do. do.	Divisional Mortgage gold 5 %	July, 1930	J. & J.	3,106,000.00
do. do.	Consolidated gold 5 %	Nov., 1956	M. & N.	12,770,000.00
do. do.	Equipment Notes (including Louisville Southern)	Various		415,831.59
Alabama Central	First Mortgage gold 6 %	July, 1918	J. & J.	1,000,000.00
Southern Railway	East Tennessee Reorganization dated October 2, 1894, for old Equipment and Improvement bonds, gold, 4 % to March, 1898, inclusive, 5 % thereafter	Mar., 1938	M. & S.	4,500,000.00

(1) Also payable in London, England.

THIS PAGE BOUND

51 Name of railroad company.	Name of bond.	Due.	Int.	Amount.
	B.			
	On properties practically owned by (*) or leased to (†) Southern Railway Company.			
*† Virginia Midland	Serials [1]	Various...	M. & S.	$7,635,000.00
†† do.	General Mortgage 5 %	May, 1936	M. & N.	4,859,000.00
*† Charlottesville & Rapidan	First Mortgage 6 % [2]	July, 1913	J. & J.	421,700.00
*† Franklin & Pittsylvania	First Mortgage 6 % [3]	July, 1913	J. & J.	79,000.00
† Atlanta & Charlotte Air Line	Preferred Mortgage 7 %	April, 1897	A. & O.	500,000.00
† do. do.	First Mortgage 7 %	Jan., 1907	J. & J.	4,250,000.00
† do. do.	Income 6 %	April, 1900	A. & O.	750,000.00
† do. do.	Stock 5–6 %	.....	M. & S.	1,700,000.00
† North Carolina	Rental Equivalent to 6½ % on stock	Sept., 1901	J. & J.	4,000,000.00
* Knoxville & Ohio	First Mortgage gold 6 %	July 1, 1925	J. & J.	2,000,000.00
	C.			
	On all the property of the Southern Railway Company, including leaseholds, stocks and bonds.			
Southern Railway	First Consolidated Mortgage gold 5 % dated October 2, 1894—total issue $120,000,000, of which:	July, 1994	J. & J.	
	Reserved to take up foregoing bonds, stocks, &c...	$78,088,372.13		
	do. for new construction and other purposes.	20,000,000.00		
	To be issued now	21,911,627.87	.....	21,911,627.87
	Total existing debt Southern Railway Company		.....	$100,000,000.00

(1) Interest payable in Baltimore, Md.
(2) Interest payable in Philadelphia, Pa.
(3) Interest payable in Baltimore, Md.

JAMES H. WOOD.

52 "SCHEDULE B."

Southern Railway Company.

The purchasers of the railroad and other property of the Richmond and Danville Railroad Company, at the foreclosure sale thereof held in the City of Richmond on the 15th day of June, 1894—viz., Charles H. Coster and Anthony J. Thomas and their associates—constituting Southern Railway Company, a corporation organized and existing under the laws of the State of Virginia, and particularly an Act of Assembly of said State entitled—

"An Act authorizing the purchasers of the Richmond and Dan-
"ville Railroad, their assigns and successors, to become and be a
"corporation, to adopt a name therefor, and to possess and exercise
"general powers, and authorizing the leasing to or by, and the con-
"solidation therewith of, other corporations," approved February 20, 1894,

have adopted and adopt the following as

The Plan of Organization.

First. The said purchasers and the Southern Railway Company have accepted and do accept the before-mentioned Act of Assembly of the State of Virginia, and, anything herein contained or herefrom omitted to the contrary notwithstanding, they do reserve and retain the right from time to time and at all times to exercise and enjoy any and every right, power, privilege and franchise conferred in and by said Act of Assembly of the Commonwealth of Virginia approved February 20, 1894, or by any other act or law of which the Southern Railway Company may lawfully claim the benefit.

Second. The said purchasers and the Southern Railway Company have fixed the capital stock of the corporation at $180,000,000, divided into one million eight hundred thousand shares of the par value of $100 each, of which six hundred thousand shares are preferred stock and the remainder are common stock, reserving the right to increase such capital stock up to, but not exceeding, the limit authorized by the said Act of Assembly of the Commonwealth of Virginia approved February 20, 1894, and to increase or decrease the amount of any class or kind or grade of its capital stock, and also reserving any and all right to redeem and purchase at par any and all preferred stock, or any kind, class or grade thereof.

The Preferred Stock is entitled to the following preferences, and to no other—viz:

In each and every fiscal year after the first day of July, 1895, to receive non-cumulative dividends at and up to the rate of five per cent. per annum in preference and priority to the payment of any dividend on the Common Stock in such fiscal year, but only from the net profits of the Company as such shall be fixed and de-
53 termined by the Board of Directors, and only when and as such Board shall declare dividends therefrom; but, notwith-

standing the preference hereby declared, if, after providing for the payment of dividends for any fiscal year on the Preferred Stock outstanding in such year, there shall remain a surplus of net profits of such year, the Board of Directors may declare and pay dividends upon any other stock of the Company for such year out of such surplus net profits.

Such Preferred Stock is authorized to the amount of Sixty Million Dollars; and, without the consent of the holders of a majority of such Preferred Stock then outstanding, the Company can neither increase such authorized amount thereof nor put upon its property any mortgage to secure bonds for more than the aggregate principal sum of one hundred and twenty million dollars, in addition to prior liens thereon, assumed, extended or renewed, or any substitutions therefor, against which a like amount of bonds shall be reserved out of such amount of $120,000,000.

The conditions and voting power in respect of and belonging to all such stock are as follows:

With the exception of one thousand shares of common stock, heretofore issued or reserved to qualify Directors, or for other purposes, all of the stock of the Company—viz., 1,199,000 shares of common stock and 500,000 shares of preferred stock—have been duly issued and have been duly delivered to J. Pierpont Morgan, Charles Lanier and George F. Baker and their successors, as Voting Trustees, under an agreement dated October 15, 1894, with the exclusive right and privilege, in the said Voting Trustees during the continuance of their trust, as stated in said agreement, to vote upon and in respect of all such stock so issued to them, and also to collect and receive any dividends declared in respect of such stock, and to distribute any such dividends among the holders of their stock-trust certificates, which holders in due course will be entitled to receive in exchange therefor certificates for corresponding amounts and kinds of the capital stock of this Company then entitling them to one vote for each share thereof, and in the meantime to receive payments equal to the dividends, if any, collected by the Voting Trustees upon such number of such shares standing in the name of the Voting Trustees, who, until after the actual delivery of such stock certificates, shall possess and shall be entitled to exercise all rights of every name and nature, including the right at each and every corporate meeting or election to cast one vote for and in respect of each and every share of the capital stock of the Southern Railway Company on account of which such stock-trust certificates shall be issued, it being expressly stipulated that no voting right passes from the Company or from the Voting Trustees by, under or in respect of any such stock-trust certificate, or by or under any agreement expressed or implied.

54 Third. The prices and terms upon which the Southern Railway Company from time to time has issued and sold or shall issue and sell its bonds and its capital stock are those which heretofore have been or from time to time hereafter shall be approved by a majority in amount of the stockholders at their meetings, bonds to the aggregate amount of $124,500,000 having been

heretofore authorized for all purposes, including the payment of all prior liens.

Fourth. The By-Laws of the Southern Railway Company are those which, on the fifth day of July, 1894, were duly adopted by the Board of Directors of said Company at its first meeting, and upon the same day adopted and ratified by the stockholders at their first meeting, subject to the amendments thereto from time to time adopted and to be adopted as therein provided, and the officers and duties of the officers of the Company shall be as provided by such By-Laws, a true copy of such By-Laws, as amended to this date, being hereunto annexed, marked "Schedule C," forming part of this plan of organization.

In witness whereof, the said purchasers—Chas. H. Coster and Anthony J. Thomas—have hereunto subscribed their names, and the Southern Railway Company has caused its common seal to be hereunto affixed and to be attested by the signature of its President this fourth day of December, 1894.

C. H. COSTER.
ANTHONY J. THOMAS.

[Seal of Southern Railway Company.]

SOUTHERN RAILWAY COMPANY,
By SAMUEL SPENCER, *President.*

STATE OF NEW YORK, *City and County of New York, ss:*

I, George H. Corey, a Commissioner of Deeds for the State of New York, thereto duly appointed by the Governor of the State of Virginia, and being also a Notary Public for the said City and County of New York, thereto duly appointed by the Governor of the State of New York, do hereby certify that Charles H. Coster and Anthony J. Thomas, whose names are signed to the writing hereto annexed, bearing date on the fourth day of December, 1894, have severally acknowledged the same before me in my State and corporation aforesaid.

And I do further certify that in my said State and corporation, on this fourth day of December, 1894, before me personally appeared Samuel Spencer, whose name is signed to the foregoing and hereto annexed Plan of Organization, bearing date the fourth day of December, 1894, as President of the Southern Railway Company, the corporation described in and which executed the said plan, and for himself and in behalf of the said Southern Railway Company, being informed of the contents of the said plan, did on this day acknowledge the due execution of the plan on the day the same bears date; and further acknowledged that he voluntarily executed, signed, sealed and delivered the said plan as his free act and deed,
55 and as the free act and deed of the said Southern Railway Company, for the uses and purposes therein mentioned, and for the purposes therein contained:

And the said Samuel Spencer, being by me first duly sworn, did depose and say: That he resided in the City of New York; that he is

President of the said Southern Railway Company; that he knows the corporate seal of the said Company; that the seal affixed to the foregoing Plan is the corporate seal of the said Company, and was thereto affixed by authority of the Board of Directors of the said Company, and that he signed his name thereto by like authority as President of said Company.

In witness whereof, I have hereunto set my hand and seals of office as Commissioner of Deeds for the State of Virginia, and as Notary Public for the City and County of New York, at my office, this fourth day of December, 1894.

[Seal of George H. Corey, Commissioner for Virginia.]

GEORGE H. COREY,
Commissioner for the State of Virginia in New York.

[Seal of George H. Corey, Notary Public, New York.]

GEORGE H. COREY,
Notary Public for the City and County of New York in the State of New York.

STATE OF NEW YORK, *City and County of New York, ss:*

I, Henry D. Purroy, Clerk of the City and County of New York, and also Clerk of the Supreme Court in said City and County, the same being a court of record, do hereby certify that George H. Corey, whose name is subscribed to the certificate of acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment a Notary Public in and for the City and County of New York, dwelling in the said City, commissioned and sworn, and duly authorized to take the same and to administer oaths; and, further, that I am well acquainted with the handwriting of said Notary Public, and verily believe that the signature to the said certificate of acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 12th day of December, 1894.

[Seal of the Supreme Court, City and County of New York.]

HENRY D. PURROY, *Clerk.*

56 "SCHEDULE C."

BY-LAWS

OF THE

SOUTHERN RAILWAY COMPANY,

December 4, 1894.

Stockholders.

1. The annual meeting of the Stockholders, for the purpose of electing Directors, and for the purpose of transacting such other business as may come before the meeting, shall be held on the Tuesday preceding the last Tuesday in October of each year, at the office of the Company in the City of Richmond, Virginia, and notice thereof shall be given for two successive weeks in a newspaper published in the City of Richmond.

2. A general meeting of the Stockholders may be held at any time upon the call of the Board of Directors, or Stockholders holding together one-tenth of the capital stock, upon their giving notice of the time and place for such meeting for thirty days in one of the principal newspapers published in the City of Richmond, the City of Knoxville, Tennessee, and the City of New York.

3. To constitute a meeting of Stockholders, there must be present, either in person or by proxy, those who can give a majority of all the votes which could be given by all the Stockholders. If a sufficient number fail to attend at the time and place for the meeting, those who do attend may adjourn from time to time until a meeting shall be regularly constituted. A meeting of Stockholders may adjourn from time to time until their business is completed. No notice shall be necessary for the holding of an adjourned meeting.

4. At any meeting of the Stockholders each Stockholder may, in person or by proxy, duly appointed by instrument in writing subscribed by such Stockholder, duly attested, and filed with the Secretary at or before the meeting, give one vote on each share of stock held by him in the same right.

5. In order to effect an organization, the meeting shall be called to order by the President, or in his absence by the First, Second or Third Vice-Presidents, in the order named, and a Chairman shall be elected. In the absence of the President and all the Vice-Presidents, any Stockholder, or the duly appointed proxy of any Stockholder, may call the meeting to order. The polls shall be opened as soon as the organization of the meeting shall admit of, and shall be kept open for one hour, under the supervision of three Tellers, who shall have been previously appointed by the Board of Directors; or if not so appointed, or, if in case of appointment, all or any of them shall fail to act, appointments to fill the vacancies shall
57 be made at such meeting by its Chairman. The votes for Directors, or for determining any other question as above

provided, shall be by ballot, and each Stockholder shall be entitled to one vote for each share of stock held by him.

As soon as may be after the polls are closed, the Tellers shall make and subscribe, and report to the meeting, a certificate of the result of the election, which shall be entered at large on the records; and thereupon each person elected shall be notified by the Secretary of his election.

The Directors may be residents of any part of the United States. In case any person elected shall not, within thirty days after the date of the notice of his election, signify his acceptance, the Board of Directors may declare a vacancy to exist.

6. Certificates of stock, signed by the President or one of the Vice-Presidents and by the Secretary or Assistant Secretary, and sealed with the corporate seal of the Company, shall be issued to the Stockholders, subject to such rules and regulations as the Board of Directors may from time to time prescribe; and transfers of certificates shall be made only on the books of the Company, on the written order of the holder or his duly-appointed attorney, upon surrender of the original certificate. The transfer books shall be closed for at least ten days previous to, and on the day of, the annual meeting, and at and for such other times as the Board of Directors shall order.

7. When a person to whom such a certificate is issued alleges it to have been lost, he shall file in the office of the Company, first, an affidavit setting forth the time, place and circumstances of the loss; second, proof of his having advertised the same, in a newspaper of general circulation published in the City of New York, once a week for two successive months; and, third, a bond to the Company with one or more sufficient sureties, with condition to indemnify all persons against any loss in consequence of issuing a new certificate in place of the former; and thereupon the Board of Directors may cause a new certificate to be issued.

8. For the convenience of security holders the Board of Directors may arrange for an agency in New York for the transfer of Stock and of Registered Bonds of the Company; proper records of such transfers to be kept at such agency, and to be open to the inspection of the Secretary.

Directors.

9. From and after the first annual meeting of the Stockholders the Board of Directors shall consist of nine members (of whom the President shall be one), who shall hold their office for one year, and until their successors are elected. Any vacancy in the Board may be filled by a majority of the Directors. A majority of the Board shall be a quorum for the transaction of business.

10. Regular meetings of the Board shall be held on the second Thursday of January, April, July and October, and special
58 meetings of the Board may be called by order of the President or of the Executive Committee, or of a majority of the Board, and written notice of each meeting, whether regular or special, shall be delivered or mailed to each Director a reasonable time

before the meeti .g. All such meetings shall be held either in Richmond, Knoxville, or in New York City.

11. The Directors elected at the annual meeting shall meet as soon as may be thereafter, and they shall elect a President, a First Vice-President, a Second Vice-President and a Third Vice-President of the Company, each to hold office for one year, or until the next election of the Directors, and until his successor is elected; and they shall also elect, to hold office during the pleasure of the Board, a General Counsel, a Secretary and Treasurer, and they may also elect or appoint an Auditor. The President shall be elected from among the members of the Board.

12. The order of business at all meetings of the Board, except adjourned meetings, shall be as follows:

1st. Reading the Minutes of the last meeting.
2nd. Correspondence.
3rd. Reports of Officers.
4th. Reports of Standing Committees.
5th. Reports of Special Committees.
6th. Unfinished Business.
7th. Original Resolutions and New Business.

13. In case a vacancy shall have occurred in the office of the President, First, Second or Third Vice-President, Secretary or Assistant Secretary, Treasurer or Assistant Treasurer, or Auditor, the Board of Directors shall fill the same as early as practicable, and until so filled the President, or in his absence the First, Second or Third Vice-President, in the order named, may make an appointment *pro tem.*, to fill the vacancy temporarily; or in case of temporary incapacity or absence of any officer, other than the President or First, Second or Third Vice-President, the President, or in his absence the First or Second Vice-President, in the order named, may make an appointment *pro tem.*, to act in place of the officer so temporarily incapacitated or absent, but such appointment shall be subject to change by the Board or Executive Committee at any regular or special meeting thereafter.

14. The compensation of all officers of the Company shall be fixed by the Board of Directors from time to time. Each Director shall be paid ten dollars for each meeting of the Board, and of any committee of which he is a member, at which he shall attend, in addition to transportation and other expenses actually incurred, at the rate of not exceeding four cents per mile to and from his place of residence to the place of meeting.

15. The Board of Directors shall make a report to the Stockholders at their annual meeting.

59 The Corporate Seal.

16. The Common Corporate Seal is, and until otherwise ordered by the Board of Directors shall be, an impression upon paper or wax of a circular device, such as that impressed upon the margin hereof, being an ornamental center surrounded by the words "*Southern*

Railway Company, June, 1894," within, containing circumferential lines.

The Secretary of the Company shall procure, preserve and keep duplicate stamps suitable to make such impression of such corporate seal; and, when as directed by the special or general resolution of the Board of Directors or of the Executive Committee, the President, either of the three Vice-Presidents or the Secretary or Assistant Secretary, may and shall use one or the other of such duplicate stamps in impressing such corporate seal upon the documents, indentures and obligations of the Company.

President and Vice-Presidents.

17. The President shall preside at all meetings of the Stockholders and of the Directors. In his absence the First Vice-President, Second Vice-President or Third Vice-President, in the order named, shall preside. In the absence of the President and the First, Second and Third Vice-Presidents, the members present shall appoint one of their number to preside. The President shall have general charge, control and supervision of all the business and affairs of the Company, and over all its officers, agents and employees. Except when these By-Laws otherwise provide, or the Board shall otherwise direct, all officers and heads of departments of the Company shall be appointed by him and subject to removal by him.

18. The First Vice-President shall, during the absence or inability of the President, perform his duties. During the absence or inability of the President and First Vice-President the Second Vice-President shall perform his duties, and during the absence or inability of the President and First and Second Vice-Presidents the Third Vice-President shall perform his duties. The Vice-Presidents shall also perform such other duties as may from time to time be assigned to them respectively by the President or by the Board.

19. All deeds of conveyance of the Company's lands, and all other instruments required to be executed by the Company itself, under its corporate seal, shall be signed by the President (or First, Second or Third Vice-President) for and in the name of the Company, except in such cases as the Board of Directors shall otherwise order; and the seal of the Company shall be thereto affixed by the President (or First, Second or Third Vice-President) or by the Secretary or Assistant Secretary, and attested by the Secretary or Assistant Secretary, and the execution thereof shall be acknowledged by the President (or First, Second or Third Vice-President) or other person designated by the Board to execute the same, as the act and deed of the Company, in such manner and form as may be required by law.

Other Executive Officers.

20. The Board of Directors shall have power to elect or appoint any other officers or assistants, who shall perform such duties as may be assigned to them by the Board by general rules, or from

time to time; and who shall hold their office during the pleasure of the Board.

Committees.

21. There shall be an Executive Committee, consisting of four members of the Board, of whom the President shall be one. Other Committees, standing or special, may be appointed with such duties and powers as shall be assigned to and given them by the Board. Meetings of the Executive Committee may be called by order of the President, or of a majority of said Committee to be held at such convenient place or places as he or they shall appoint, on written notice delivered or mailed to each member thereof a reasonable time before the meeting, and three members shall constitute a quorum.

In case of the anticipated absence of any member of the Executive Committee from any meeting of said Committee, or in case of inability of any member to attend such meeting, the President (or First, Second or Third Vice-President, in the order named, in his absence) may, at any time before such meeting is called to order, appoint a Director to serve during such absence or inability in place of the absent member or of the member unable to attend, but such appointment shall not extend to more than one member absent or unable to attend, and any member of the Committee present at any meeting may object to such appointee before the meeting is called to order, in which case the appointment shall be void and of no effect. No Vice-President shall be a member of the Executive Committee.

22. The Executive Committee, when the Board is not in session, shall have and may exercise, but only by the unanimous vote of all the members present at a meeting, all the powers of the Board of Directors; and they shall cause to be kept a full and accurate record of all the actions and proceedings, and report the same from time to time to the Board.

23. The said Committee shall have charge of all questions of finance, accounts and claims. It shall be the duty of this Committee, from time to time, at their discretion, and whenever directed by the Board, to audit and pass upon the accounts of the Treasurer, and to examine the transfer books of the Company; they shall report to the Board at every regular meeting, and at any special meeting, as occasion shall require.

61 24. All reports of Committees, standing or special, shall be made to the Board in writing, signed by the Chairman or by the member designated by the Committee to make the report.

25. All Committees shall be appointed by the President, unless it be otherwise directed by the Board. A majority of the members of all Committees shall be a quorum, except as limited in article twenty-one.

The General Counsel.

26. The General Counsel, subject to the President and the Board of Directors, shall have general charge and supervision of the legal business of the Company.

The Secretary.

27. It shall be the duty of the Secretary to attend all meetings of the Board of Directors and of the Stockholders, and of the Executive Committee, and record the minutes of their proceedings in suitable books to be provided for that purpose, and of which he shall be the custodian. He shall give due and timely notice to the Directors of all regular and special meetings of the Board, and of meetings of Committees to the members thereof. He shall take charge of all reports, resolutions and papers, after they shall be acted upon or submitted to the Board, and also of all letters and papers pertaining to the general business of the Company, except the official bonds. He shall be the custodian of the seal of the Company, and it shall be his duty to affix the same to all such proper instruments as the Board or the President, or either Vice-President, may direct, or to allow the President or either Vice-President so to affix it. The Directors may, if they think proper, appoint an Assistant Secretary, who shall have his office in Richmond, and perform or assist in the performance of such of the above duties as they may prescribe.

28. The Stock Books shall be kept by the Secretary, and he shall also keep transfer books, on which he shall register all transfers of stock and of registered bonds, and the names and addresses of all the transferees, unless the Board of Directors should arrange for a transfer agency in New York, in which case the said stock books and other books in this section provided for shall be kept there, subject to the supervision of the Secretary.

The Treasurer.

29. The Treasurer shall have his office in Richmond. It shall be his duty, either in person or through competent and faithful assistants, cashiers or disbursing officers, to receive and disburse, under the direction of the Board, all moneys belonging or coming to the Company; to keep regular, full and true accounts of all receipts and disbursements, and to make detailed reports of the same to the Board of Directors at the regular meetings and at all other times when required.

62 30. The moneys and securities of the Company shall be kept in such bank or banks, or other depository or depositories, as the Executive Committee or the Board may from time to time direct.

31. No payment shall be made except upon a sufficient voucher duly certified or approved by the proper officer.

32. The Treasurer and all other officers and agents who shall receive or disburse moneys, or have custody of moneys or securities,

shall give bonds, with sureties approved by the Board or by the Executive Committee, for the faithful discharge of their duties, and for the safe keeping and due delivery of the moneys, securities and other property of the Company committed to them or that shall come to their hands.

33. The Directors may, if they think proper, appoint an Assistant Treasurer, who shall have his office at such place as they may direct, and perform or assist in the performance of such of the above duties as they may prescribe.

Auditor.

34. The Auditor shall have direct charge of the general books and accounts of the Company; and it shall be his duty and he shall have power to enforce the system prescribed for keeping the same. He shall, on approval of the President or in his absence, of either of the three Vice-Presidents, prescribe the form of all payrolls, vouchers, accounts, reports and returns of every description required in his department, and also the time at which the same shall be rendered. It shall be his duty to examine the accounts of all officers and employees and to see that the proper returns are made of all receipts from traffic and other sources, and that correct vouchers are turned over to him for all disbursements for any purpose. There shall be returned to the Auditor, at such time in every month as he may prescribe, all bills and payrolls for the previous month, properly certified and made in detail. The Auditor shall approve and audit the same if found correct in every particular. But he shall not approve or audit any voucher or payroll unless it has been previously certified to by the head of the department in which it originated; and this approval will not be held to relieve him from the duty of exercising due caution and diligence in satisfying himself that the voucher or payroll is correct and duly authorized. And in case of doubt it shall be his duty to refer it back to the officer certifying the same; and if the information furnished is not satisfactory, he shall refer it to the President, or, in his absence to either Vice-President. He shall also be the custodian of all bonds of officials and agents of the company handling funds. The Auditor shall have the right to appoint and remove all necessary assistants or clerks in his department, subject to the approval of the President, or in his absence, of either Vice-President, and he shall be held responsible for the proper performance of their duties.

63 *Amendments.*

35. These By-Laws may be altered, amended, added to or repealed at any regular meeting of the Board of Directors by a vote of two-thirds of all Directors present, provided such two-thirds constitute a majority of all the Directors of the Company, and provided written or printed notice of the proposed alteration, amendment, addition or repeal shall have been given at a previous regular meeting or they may be altered, amended or added to or repealed, in like manner at

any regular or special meeting, of which written or printed notice, stating the object of the meeting as above shall have been given or sent to each Director at least ten days previous to the time appointed for such special meeting; or they may be amended at any annual or general meeting of the stockholders by a vote of a majority in amount of all the shares.

"SCHEDULE D."

AN ACT

AUTHORIZING THE PURCHASERS OF THE RICHMOND AND DANVILLE RAILROAD, THEIR ASSIGNS AND SUCCESSORS, TO BECOME AND BE A CORPORATION, TO ADOPT A NAME THEREFOR, AND TO POSSESS AND EXERCISE GENERAL POWERS; AND AUTHORIZING THE LEASING TO OR BY, AND THE CONSOLIDATION THEREWITH OF, OTHER CORPORATIONS.

[Approved February 20, 1894.]

Whereas, a certain suit in equity is now pending in the Circuit Court of the United States of America for the Eastern District of Virginia, wherein the Central Trust Company of New York is complainant, and the Richmond and Danville Railroad Company, a corporation created by and existing under the Laws of the State of Virginia, is defendant, in which suit it is sought to foreclose the consolidated mortgage, dated the twenty-second day of October, in the year one thousand eight hundred and eighty-six, and upon or about that day duly executed, acknowledged and delivered by said railroad corporation to said Central Trust Company of New York, and subsequently supplemented and confirmed by said railroad corporation by instruments dated November first, eighteen hundred and eighty-six, and April thirtieth, eighteen hundred and eighty-eight, respectively, in which suit also it is proposed to sell the whole of the mortgaged property and premises, being the rights, property, privileges and franchises of the said the Richmond and Danville Railroad Company;

And, whereas, it is deemed desirable and for the interest of this Commonwealth that the said railroad property shall be sold and reorganized in such manner and under such conditions as to secure the largest and best possible facilities and advantages of trans-
64 portation and communication for the people of this State; now therefore;

1. *Be it enacted by the General Assembly of Virginia*, that the purchaser or purchasers of the said mortgaged premises of the said the Richmond and Danville Railroad Company at the foreclosure sale thereof in the course of the said suit in equity, and such person or persons as he or they may associate with himself or themselves, shall forthwith be, and they hereby are, constituted a body politic and corporate by the name which they may select, as set forth in the conveyance of said mortgaged premises, or in any writing signed by him or them and recorded in the court in which the said con-

veyance shall be recorded, and such new corporation shall have, possess and be invested with all the estate, right, title and interest in and to such railroad and other property, with their appurtenances, and all the franchises, rights and privileges had and possessed by the said Richmond and Danville Railroad Company to the same extent as a purchaser under sections twelve hundred and thirty-three and twelve hundred and thirty-four of the Code of Virginia, and shall perform all the duties prescribed by said sections of said Code; provided, however, that said new corporation shall not be limited as to the amount or classification of its stock or bonds, except that the total amount of stock issued shall not exceed three hundred and fifty million dollars, and shall have no immunity from any lawful State, county or municipal taxation by reason of its former charter or any law heretofore exempting it from taxation.

2. Such purchaser or purchasers may associate with him or them any number of persons in the organization of the new corporation, which may create and issue its stock and its bonds secured by mortgage or otherwise, according to any plan adopted by such purchaser or purchasers, and filed as hereinafter provided.

3. It shall be the duty of such new corporation within six months after the conveyance to it of said mortgaged premises to execute a certificate in writing under its common seal attested by the signature of its President or Vice-President, referring to the sale and conveyance by which it shall have acquired title to such premises and the plan of organization adopted by the purchasers, the amount and classes or kinds of capital stock and mortgage bonds or other obligations authorized to be issued, and also specifying the name of such new corporation and of its President, and the number and names of its Directors, which certificate shall be filed in the office of the Secretary of the Commonwealth of Virginia, and a certified copy thereof shall be conclusive evidence of the existence of such new corporation.

4. In addition to its other powers, such new corporation shall have, and from time to time as occasion arises may exercise, the following powers, or any of them, namely:

(*a*) With the approval of a majority of its stockholders, given at a meeting, it may, from time to time, lease, use, operate, consolidate with, or purchase or otherwise acquire, or be leased, used, operated by, or consolidated with, any railroad or transportation company now or hereafter incorporated by the laws of the United
65. States, or of any of the States thereof, or any one or more of such railroad or transportation companies, or any other railroad or transportation company or companies which now are or hereafter may be leased, or used, or operated by, or consolidated with any one or more of such railroad or transportation companies; and, from time to time, it may consolidate its capital stock, property and franchises, by change of name or otherwise, with the capital stock, property and franchises of any other railroad or transportation company, power being hereby granted to any railroad or transportation company or companies incorporated by or under any act or acts of the General Assembly of the State of Virginia, with the approval of

a majority in amount of its or their shareholders respectively given at a meeting, to make and carry out such contracts of consolidation or lease, sale or other method of acquisition; *provided* that, in all consolidations, a copy of the agreement therefor shall be filed in the office of the Secretary of the Commonwealth of Virginia, and that any corporation with which said new corporation may consolidate, or which it may lease, shall be or remain subject to the jurisdiction of the courts of this State, and all lines of railroad operated by it in the State of Virginia shall be subject to the general laws of the State; and *provided, further,* that any stockholder who dissents from any such consolidation may within sixty days thereafter apply by petition to the Circuit Court of the City of Richmond to determine the value of his stock, and shall be entitled to receive from the new corporation the value as thus determined of such stock upon transfer thereof to the new corporation.

(*b*) It may from time to time purchase, own and hold bonds or other evidences of debt, and shares of the capital stock of any railroad company or companies formed under the laws of this or any other State, and from time to time may guarantee or assume the bonds, evidences of indebtedness or capital stock of any such railroad company.

(*c*) It may from time to time acquire or guarantee the stocks and bonds, or either, of any inland, coast or ocean transportation company or companies, operating to or from any point or points on its lines; and it may develop or aid in the development of its business by acquiring or guaranteeing the stocks and bonds, or either, of hotel, lighterage, wharf, elevating and other such enterprises convenient in connection therewith or as part thereof.

5. Said new corporation may issue its capital stock of one or more classes or kinds, and in one or more series or grades, with such preferences, conditions and voting power as shall be provided in said plan of organization, and from time to time it may increase or decrease the amount of any class or kind or grade of such stock as shall be provided in said plan of reorganization, or with the approval of a majority in amount of the stockholders, given at a meeting of stockholders called for that purpose, unless and except as otherwise expressly provided in certificates representing stock previously issued. The shares of each class of stock shall be of such par amount, and shall entitle the holders to such vote respectively as shall be determined in the said plan of reorganization or by the stockholders in like manner.

6. Such new corporation may borrow money and issue bonds or other evidence of indebtedness therefor, and may secure the same, from time to time, by mortgage or deed of trust upon any or all of its property and franchises, and such new corporation, from time to time, may issue and sell its bonds and its capital stock at such prices and on such terms as shall be specified in said plan of organization, or as a majority in amount of the stockholders shall approve at any meeting, and may receive in payment therefor property, securities or shares in any corporation mentioned in this act, and any stock so issued shall be deemed fully paid and free from any liability.

7. The business, property and concerns of said corporation shall be managed by a Board of Directors consisting of not less than five members, and one of their number shall be chosen as President. The stockholders may adopt by-laws for the government of the stock, property and concerns of the corporation, and for the regulation of its directors, officers and agents, and in and by such by-laws the stockholders may prescribe how such by-laws may be amended or repealed; provided, however, that until such by-laws shall be adopted by the stockholders the corporation shall be governed by by-laws adopted in accordance with the plan of organization.

8. The principal office of the Company shall be in the City of Richmond, in this State, at which all meetings of the stockholders shall be held; and all other offices and workshops of said Company shall be located in the State of Virginia, as far as the same may be practicable.

9. It shall be lawful for the Circuit Court of the City of Richmond, upon the petition of the President and Board of Directors, at any time to order a change in the name of the Company; but any such change of name shall be without prejudice to the rights of any creditor, or to the exercise of any of the powers and privileges granted by this act.

10. There shall be paid to the Clerk of the county or corporation in which any mortgage authorized by this act may be presented for recordation, the existing rate of taxation for such recordation upon the assessed value of the road-beds, depots, station buildings and lots, and machine shops, fixtures and rolling stock, and any real estate not included in said enumeration, in the State of Virginia, conveyed in such mortgage; and upon presentation to the Clerk of the county or corporation where it is proposed to record said mortgage of a certificate of the Auditor of the State of the amount of the assessed values of the said property within the State of Virginia, and upon the payment of the tax thereon to the said Clerk, the said mortgage shall be recorded without other charge than the clerical fees provided in such cases. Certified copies of such mortgage may be recorded in any county of Virginia in which property covered by such mortgage may be located upon payment of clerical fees.

11. All taxes and debts due or to become due the State of
67 Virginia by the corporation shall be paid in lawful money of the United States and not in coupons.

12. This act shall be in force from its passage.

February 28, 1894.

(A Copy.)

(Signed) J. BELL BIGGER,
Clerk of the House of Delegates and
Keeper of the Rolls of Virginia.

COMMONWEALTH OF VIRGINIA:

I, Chas. T. O'Ferrall, Governor of the Commonwealth of Virginia, certify that J. Bell Bigger, whose name is signed to the within

copy of an Act of Assembly bearing date the 28th day of February, 1894, is and was at the time of signing Clerk of the House of Delegates and Keeper of the Rolls of Virginia, duly elected and qualified; that he is authorized by the laws of this State to make and sign such copy of an act, and that to all his official acts full faith, credit and authority are due and ought to be given.

In testimony whereof, I have hereunto set my hand as Governor, and caused the Great Seal of the State to be affixed. Done at the City of Richmond this 28th day of February, A. D. 1894, and in the one hundred and eighteenth year of the Commonwealth.

[GREAT SEAL OF VIRGINIA.]

(Signed) CHAS. T. O'FERRALL.

By the Governor:
(Signed) J. T. LAWLESS,
Secretary of the Comonwealth and Keeper of the Seals.

OFFICE OF THE SECRETARY OF THE COMMONWEALTH AND KEEPER OF THE SEALS OF VIRGINIA.

RICHMOND, VIRGINIA,

COMMONWEALTH OF VIRGINIA:

I, , Secretary of the Commonwealth of Virginia, certify that the foregoing is a true copy of the certificate of the Southern Railway Company, a corporation created by and existing under an Act of Assembly of the State of Virginia, approved February 20, 1894, as mentioned in Section 3 of said Act, which certificate was duly filed in my said office on the 14th day of December, 1894.

Given under my hand and the lesser seal of the Commonwealth, at Richmond, this day of , A. D.

[SEAL.]

——— ———,
Secretary of the Commonwealth and Keeper of the Seals of Virginia.

68 AN ACT

TO PROVIDE FOR THE REDUCTION OF THE CAPITAL STOCK AND THE ISSUE OF SPECIAL STOCK OF THE SOUTHERN RAILWAY COMPANY.

Approved January 23, 1900.

Whereas, pursuant to the provisions of the Act of Assembly of the Commonwealth of Virginia, approved February twentieth, eighteen hundred and ninety-four, the purchasers of the Richmond and Danville Railroad did constitute themselves a body politic and corporate by the name of

Southern Railway Company;

and also as provided by said Act, within six months after making their purchase did adopt and did file in the office of the Secretary

of the Commonwealth their certain plan of organization dated December fourth, eighteen hundred and ninety-four, whereby, among other things, they did certify that the said purchasers and the Southern Railway Company had fixed the capital stock of the corporation at one hundred and eighty million dollars, divided into one million eight hundred thousand shares, each of the par value of one hundred dollars, of which six hundred thousand shares are preferred stock and the remainder are common stock, the corporation reserving the right to increase such capital stock up to, but not exceeding the limit authorized by the said act, approved February twentieth, eighteen hundred and ninety-four, and the right to increase or to decrease the amount of any class or kind or grade of its capital stock, and also to redeem and to purchase at par any and all preferred stock, or any kind, class or grade thereof; and further did certify that with the exception of one thousand shares of common stock theretofore issued or reserved to quality Directors, or for other purposes, all of the stock of the Company had been duly issued and delivered to J. Pierpont Morgan, Charles Lanier and George F. Baker, and their successors, as Voting Trustees, under an agreement dated October fifteenth, eighteen hundred and ninety-four, with the exclusive right and privilege in said Voting Trustees, during the continuance of their trust as provided in said agreement, to vote upon and in respect of, all stock so issued to them, and also to collect and receive all dividends declared in respect of such stock, and to distribute any such dividends among the holders of their stock trust certificates, which holders in due course would be entitled to receive in exchange therefor certificates for corresponding amounts and kinds of the capital stock of the Southern Railway Company; and

Whereas, from time to time, the said corporation has issued stock certificates for the full amount of one million eight hundred thousand shares, each of the par value of one hundred dollars of
69 which six hundred thousand shares are preferred stock, and one million two hundred thousand shares are common stock, all of which stock certificates (excepting those for such one thousand shares of common stock) have been duly issued to, and now are held by, the said Voting Trustees under the said Voting Trust Agreement dated October fifteenth, eighteen hundred and ninety-four; and

Whereas, in and by Section five of the said Act, approved February twentieth, eighteen hundred and ninety-four, it was provided that the said new company might issue its capital stock of one or more class or kinds and in one or more series or grades, with such preferences, conditions, and voting power as should be provided in said plan of organization; and from time to time might increase or decrease the amount of any class or kind or grade of such stock as should be provided in the plan of organization, or with the approval of a majority in amount of the stockholders given at a meeting of the stockholders called for that purpose, unless and except as otherwise expressly provided in certificates representing stock previously issued; and that the shares of each class of stock should be of such par amount, and should entitle the holders to such vote, respectively,

as should be determined by said plan of organization, or by the stockholders in like manner; and

Whereas, no express provision concerning any increase or decrease of the common capital stock is contained in any outstanding certificate representing common stock, and it is deemed desirable for the interests of the Company and of the Commonwealth that the nominal value of such common stock shall be reduced so as to conform more nearly to the market value thereof; *now, therefore,*

1. *Be it enacted by the General Assembly of Virginia:* That in the manner hereinafter provided, with the consent of holders of a majority of all outstanding stock of the Southern Railway Company, including at least a majority of outstanding common stock, the Board of Directors of the Company, from time to time in reduction of the amount of its stock, may issue one share of a new or special stock as hereinafter described, in lieu and instead of the issue of two shares of the stock authorized by said Act approved February twentieth, eighteen hundred and ninety-four, but not heretofore issued, or in exchange for every two shares of the common stock now outstanding that may be surrendered for that purpose and cancelled. The company may agree to pay a dividend or other cash sum in connection with such exchanges of outstanding common stock; the amount of such dividend or other cash sum to be fixed by the Board of Directors, and payment thereof to be made at such time and in such manner as in its discretion the board may determine. The consent hereunder of stockholders may be given either in writing or by vote at a meeting or by a combination of consents in writing or by vote.

2. Holders of stock trust certificates may authorize the Voting Trustees as holders of the corresponding amount of stock to consent to such reduction, and may confer any other authority upon the Voting Trustees by presentation of such certificates to the Voting Trustees, in order that a notation of such authority may be stamped thereon. Such stamp on any stock trust certificate shall be conclusive proof that the holder thereof has given such authority, which shall bind all transferees of such certificate and of any interest thereby represented, and shall be irrevocable. In exchange for stock trust certificates stamped as aforesaid there shall be issued stock trust certificates either in the present form similarly stamped, or in a new form adapted to the conditions as altered under this Act.

3. If and when the holders of a majority of the outstanding stock, including such amount of the outstanding common stock (not less than a majority thereof) as shall be satisfactory to the Board of Directors, shall have consented to the reduction herein authorized, the company from time to time within such period or periods as shall be prescribed or extended by the Board of Directors, shall issue a new certificate for one share (of the par value of one hundred dollars) of the special stock authorized by this Act in exchange for every two shares of outstanding common stock surrendered for that purpose; and as hereinbefore authorized, thereupon shall make pay-

ment of such dividend or other cash sum, if any, as it may have agreed to pay.

4. All such special stock, whether issued as herein permitted in lieu of authorized common stock, or in exchange for outstanding common stock, shall be distinguished by printing on or in the certificates to be issued therefor, a statement that such stock was issued under the provisions of this Act. Until more than ninety-five per centum of the common stock then outstanding shall have been exchanged as herein permitted, and thereafter until otherwise determined by the Board of Directors, each share of such special stock shall entitle the holder thereof to receive the same dividends as though he were the holder of two shares of present common stock theretofore converted into such one share of special stock.

5. From time to time, in exchange for such amount of special stock as under this Act shall be issuable therefor the Voting Trustees may surrender to the company certificates for present common stock to the amount which by stamping or otherwise shall have been authorized by the holders of common stock trust certificates; and at the termination of the voting trust the holders of such stamped common stock trust certificates shall receive from the Voting Trustees, in lieu of the common stock so surrendered to the company and mentioned in such trust certificates special stock to the extent of one-half of such amount of such common stock. Any dividend or other cash sum that may be received by the Voting Trustees in connection with such exchanges of common stock shall be payable by them to the holders of the stamped common stock trust certificates at such time or times as the Voting Trustees may determine. After the termination of the voting trust, the Voting Trustees and the Board of Directors, upon such terms as they may deem expedient may make arrangements for the issue of special stock in redemption of unstamped common stock trust certificates then outstanding.

6. Nothing in this Act contained shall impair the existing and continuing right of the Southern Railway Company to in-
71 crease or to decrease its capital stock of any class or grade, whether preferred, special or common, under and in accordance with said Act of Assembly, approved February twentieth, eighteen hundred and ninety-four. With the approval of the holders of a majority of the capital stock, given at a meeting of the stockholders called for that purpose after the termination of the voting trust, the company may decrease the amount of its common stock to one-half the amount thereof by reducing the number of shares of common stock of one hundred dollars each then held by each stockholder to one-half of such number.

7. This Act shall be in force from its passage.

A true Copy.

Teste:

____ ____,

Clerk of the House of Delegates and Keeper of the Rolls of Virginia.

Date

AN ACT

TO AMEND AND RE-ENACT SECTION 7 OF AN ACT APPROVED FEBRUARY 20, 1894, ENTITLED "AN ACT AUTHORIZING THE PURCHASERS OF THE RICHMOND AND DANVILLE RAILROAD, THEIR ASSIGNS AND SUCCESSORS, TO BECOME AND BE A CORPORATION, TO ADOPT A NAME THEREFOR, AND TO POSSESS AND EXERCISE GENERAL POWERS; AND AUTHORIZING THE LEASING TO OR BY, AND THE CONSOLIDATION THEREWITH OF, OTHER CORPORATIONS."

Approved February 26, 1902.

1. *Be it enacted by the General Assembly of Virginia:* That Section Seven of an Act, approved February twentieth, eighteen hundred and ninety-four, entitled "An Act authorizing the purchasers of the Richmond and Danville Railroad, their assigns and successors, to become and be a corporation, to adopt a name therefor, and to possess and exercise general powers; and authorizing the leasing to or by, and the consolidation therewith of, other corporations," be and hereby is amended and re-enacted to read as follows:

§ 7. The business, property and concerns of said corporation shall be managed by a Board of Directors consisting of not less than five nor more than fifteen members, and one of their number shall be chosen as President. The corporation, at a general meeting or at an annual meeting, may from time to time increase or decrease, within the limits hereinbefore fixed, the number of Directors to be elected at the next annual meeting, but in case of such increase or decrease, the number to be elected shall be specified in the notice of the meeting at which the election is to be held. By the vote of a majority of the stockholders present or represented at any general meeting or at any annual meeting, the corporation may classify its Directors into three classes, as nearly as may be equal in num-
72 bers. In case such classification is made, the term of office of the Directors of the first class shall expire in one year, of the Directors of the second class in two years, of the Directors of the third class in three years, from the annual meeting at which the first Directors so classified are chosen under this Act and at each annual meeting thereafter, the Directors then to be elected shall be elected for three years. Every Director shall continue in office until the expiration of the term for which he was elected, and until his successor shall have been elected and shall have accepted his office.

All vacancies shall be filled and all Directors for whose election provision is not otherwise made in this Act, shall be elected in accordance with the by-laws. The stockholders may adopt by-laws for the government of the stock, property and concerns of the corporation, and for the regulation of its Directors, officers and agents, and in and by such by-laws the stockholders may prescribe how such by-laws may be amended and repealed, provided, however, that until otherwise voted by the stockholders, the corporation shall be governed by the by-laws of the Southern Railway Company, adopted

in accordance with the plan of organization of the Southern Railway Company filed in the office of the Secretary of the Commonwealth, dated December the fourth, eighteen hundred and ninety-four.

2. All acts and parts of acts inconsistent herewith are hereby repealed.

3. This Act shall be in force from its passage.

A true Copy.

Test:

____ ____,

Clerk of the House of Delegates and Keeper of the Rolls of Virginia.

Date

COMMONWEALTH OF VIRGINIA:

I, , Governor of the Commonwealth of Virginia, certify that , whose name is signed to the within copies of Acts of Assembly of Virginia, approved, respectively, February 20, 1894, January 23, 1900, and February 26, 1902, bearing date the day of , , is, and was, at the time of such signing, Clerk of the House of Delegates and Keeper of the Rolls of Virginia, duly elected and qualified; that he is authorized by the laws of this State to make and sign such copies of Acts of Assembly of Virginia; that such attestation is in due form and by the proper officer, and that to his official acts full faith, credit and authority are due and ought to be given.

And I further certify that whose name is signed to the within attestation of the Certificate of Southern Railway Company mentioned in Section 3, of the Act of Assembly of Virginia, approved February 20, 1894, bearing date the day of , is, and was, at the time of such signing, Secretary of the Commonwealth of Virginia, duly elected and qualified;
73 that he is the keeper of the records in which said certificate is recorded, and that he is authorized by the laws of this State to make and sign such attestation; that such attestation is in due form and by the proper officer, and that to all his official acts full faith, credit and authority are due and ought to be given.

In testimony whereof, I have hereunto set my hand as Governor, and caused the Great Seal of the Commonwealth to be affixed.

Done at the City of Richmond, this day of , in the year of our Lord , and in the year of the Commonwealth.

BY THE GOVERNOR:

____ ____,

Secretary of the Commonwealth and Keeper of the Seals.

74 EXHIBIT No. 2.

[House Bill 640—Senate Bill 25.]

AN ACT TO PROVIDE FOR THE ASSESSMENT OF REAL ESTATE OF RAILROAD COMPANIES IN THE STOCK-LAW TERRITORY FOR LOCAL BENEFIT.

The General Assembly of North Carolina do enact:

SECTION 1. That the North Carolina Corporation Commission shall assess the value of real estate belonging to any railroad company within stock-law territory in this State at the same time that they assess railroad property for general purposes.

SEC. 2. That every railroad company shall report to the Corporation Commission on blanks to be furnished by them, mileage of such railroad within the stock-law territory, width of right-of-way, weight of rails, value of rails and ties, number, description, and value of all structures within the stock-law territory, and all other information necessary to enable the Corporation Commission to ascertain the value of said real estate. That after assessment shall be made it shall not be changed until the year for the assessment of real property for general tax purposes, except that the Corporation Commission shall correct any assessment of real property on which any structure over one hundred dollars ($100) in vlaue may have been erected, or on which any structure of like value may have been destroyed, as the value of said real estate may be affected thereby.

SEC. 3. This act shall be in force from and after its ratification.

SEC. 4. All laws in conflict with this act are hereby repealed.

In the General Assembly read three times, and ratified this the 8th day of March, A. D. 1907.

EXHIBIT No. 3.

[House Bill 1484—Senate Bill 1242.]

AN ACT TO PRESCRIBE THE HOURS OF SERVICE OF EMPLOYEES OF RAILROAD COMPANIES ENGAGED IN THE OPERATION OF TRAINS.

The General Assembly of North Carolina do enact:

SECTION 1. That is shall be unlawful for any railroad company doing business in the State of North Carolina, or for any officer, agent or employee thereof who has the direction or con-
75 trol over any employee or agent of the classes mentioned below, to cause or knowingly permit or allow any employee belonging to any such class to render any service for such railroad company pertaining to the movement of trains, for a greater number of hours in any twenty-four hours than is hereinafter specified, to-wit:

(*a*) Any employee doing the work of a train dispatcher (or tele-

graph operator), having in charge in any degree the direction of the movement of any train or trains in North Carolina, for more than eight hours in any twenty-four hours: *Provided*, the Corporation Commission of North Carolina is hereby authorized to permit any such telegraph operator at any station on any road in this State to work for a longer time, not exceeding twelve hours in any twenty-four hours, where the said Corporation Commission shall determine that the safety of the traveling public will not be endangered by such extension of hours.

(*b*) Any conductor, flagman, engineer, brakeman, fireman or other member of any train crew, for more than sixteen hours in any twenty-four hours.

SEC. 2. That any railroad company, or officer or agent thereof, having the direction of or control over any employee mentioned in section one of this act, who shall violate any of the provisions hereof, shall be guilty of a misdemeanor, and upon conviction such railroad company shall be fined not less than five hundred dollars; and such officer or agent shall be fined or imprisoned, or both, in the discretion of the Court.

SEC 3. That any train dispatcher or telegraph operator, having in charge in any degree the direction of the movement of any train or trains in North Carolina, who shall work more than eight hours in any twenty-four hours as an employee performing the duties aforesaid, except as shall be permitted by the Corporation Commission under the provisions of this act, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, in the discretion of the Court.

SEC. 4. Any conductor, flagman, fireman, engineer, brakeman, or other member of any train crew, who shall work for any railroad company more than sixteen hours in any twenty-four hours, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the Court: *Provided*, that it shall not be held a violation of this act by any conductor, brakeman, flagman, engineer, fireman or other member of any train crew who shall work more than sixteen hours in any twenty-four hours in order to clear the track or tracks of said railroad company from wrecks, washouts, or obstruction caused by the act of God, so that they may bring the train or trains operated by them to a station on said road, which station shall be either the schedule destination of said train or the station at which there is regularly a change of train crews; nor shall it be held a violation of
76 this act by the corporation, officers or agents thereof, to permit the said conductor, flagman, brakeman, fireman, engineer or other member of a train crew to work overtime under the circumstances and conditions hereinbefore stated.

SEC. 5. This act shall be in force from and after its ratification.

In the General Assembly read three times, and ratified this the 8th day of March, A. D. 1907.

EXHIBIT No. 4.

[House Bill 1052—Senate Bill 1243.]

AN ACT TO AUTHORIZE THE CORPORATION COMMISSION TO REQUIRE RAILROADS TO ERECT AND MAINTAIN UNION DEPOTS IN TOWNS OF TWO THOUSAND INHABITANTS.

The General Assembly of North Carolina do enact:

SECTION 1. Wherever two or more railroads now, or hereafter may, maintain freight depots and a union passenger depot within one mile of a town of two thousand population for the convenience of the inhabitants thereof, and do not enter the corporate limits of the said town, it shall be the duty of the Corporation Commission, upon the petition of a majority of the qualified voters of the said town, which petition shall be properly sworn to by the signers thereof, to require and compel, where practicable, the said railroads to run their lines into or through the corporate limits of the said town, and construct, equip, and maintain suitable passenger and freight depots at some convenient place or places therein, and the passenger depot shall be a union station and be built and maintained by the several railroads according to a plan and in such a manner as shall be approved by the Corporation Commission.

SEC. 2. Whenever a petition shall be filed with the Corporation Commission as aforesaid, the said Corporation Commission shall set a day for the hearing thereof, which day shall be not more than twenty days from the filing of said petition, and shall immediately cause a notice to issue to the railroads interested in the matter set out in the petition, and after the hearing of the matter on the day named in the said notice, the said Commission, if a majority of its members shall deem it practicable, shall thereupon cause an order to be made requiring the said railroads to build, equip, and maintain in a suitable manner, road-beds, yards, and depots, and any other necessary buildings or equipment, at convenient places within
77 the limits of said town, as to a majority of them shall seem proper for the needs and growth of the business and inhabitants of the said town.

SEC. 3. The said order of the Corporation Commission to the said railroads shall name a time within which all the necessary work of entering the said town and construction of depots and other buildings shall be completed and opened to the public for the transaction of business, and the said railroads, for every day beyond the said time that they shall not be in operation according to the said order, shall pay the sum of fifty dollars for each and every day for such failure and neglect, to the Board of Commissioners or Aldermen of said town, which shall be for the benefit of the said town, this amount to be recovered as in other actions.

SEC. 4. This act shall also apply to any railroad that may hereafter enter into or run within one mile of the corporate limits of said town, and the Corporation Commission shall have the power to

require such railroads to unite with the other railroads in maintaining the depots, tracks, and other structures, and also pay such part of the cost thereof as to the said Corporation Commission may seem proper.

SEC. 5. The said railroads shall have the power to condemn such quantity of lands, including gardens, yards, residences and the premises pertaining thereto, as shall be necessary for the purposes of this act, the condemnation proceedings to be had in the same manner as now provided by the Revisal of one thousand nine hundred and five and amendments thereto.

SEC. 6. This act shall be in force and effect from and after its ratification.

In the General Assembly read three times, and ratified this the 11th day of March, A. D. 1907.

EXHIBIT No. 5.

[House Bill 2153—Senate Bill 256.]

AN ACT TO EXTEND AND ENLARGE THE POWERS OF THE NORTH CAROLINA CORPORATION COMMISSION.

The General Assembly of North Carolina do enact:

SECTION 1. That in addition to the powers already conferred upon and possessed by the North Carolina Corporation Commission it shall have power:

(*a*) To make any necessary and proper rules, orders and regulations for the safety, comfort and convenience of passengers, shippers or patrons of any public service corporation, and to require the observance of the same by the company and its employees.

78 (*b*) To require any railroad company to install and put in operation and maintain upon the whole or any part of its road a block system of telegraphy or any other reasonable safety device, but no railroad company shall be required to install a block system upon any part of its road upon which is not operated as many as or more than eight trains each way per day.

(*c*) To require the raising or lowering of any track or highway at any highway crossing and to designate who shall pay for the same, when they think proper, partition the cost of abolishing grade crossings and the raising or lowering of said track or highway among the railroads and municipalities interested.

SEC. 2. That section one thousand and sixty-six of the Revisal of one thousand nine hundred and five be amended by adding thereto the following: "and to require all transportation and transmission companies to establish and maintain all such public service facilities and conveniences as may be reasonable and just."

SEC. 3. That section one thousand and ninety-seven of the Revisal of one thousand nine hundred and five be amended by adding thereto subsections six and seven and eight, as follows:

(6) To require when practicable and when the necessities of the traveling public, in the judgment of the Corporation Commission,

demand, that any railroad in this State shall install and operate one or more passenger or freight trains over its road, and also require any two or more railroads having intersecting points to make close connection at such points: *Provided*, that no order under this act shall be made unless the business of the railroad justifies it.

(7) From time to time to carefully examine into and inspect the condition of each railroad, its equipment and facilities, in regard to the public's safety and convenience; and if any are found by them to be unsafe, they shall at once notify and require the railroad company to put the same in repair.

(8) That all powers and duties in every respect conferred by law upon the Corporation Commission with respect to railroads and other transportation companies are hereby conferred upon said Corporation Commission to control and regulate telegraph, telephone and all other companies engaged in transmission of messages, in so far as they apply.

SEC. 4. That section one thousand and ninety-six of [the Revisal of] one thousand nine hundred and five be amended by inserting after the word "transmission" the words "and delivery," and by inserting after the word "telegraph" the word "company"; and by striking out the remaining part of said section and inserting in lieu thereof the following: "and to make just and reasonable rates of charges for the rental of telephones and furnishing telephonic communication by any telephone company or corporation."

79 SEC. 5. That section one thousand one hundred and ten be amended by inserting after the word "person," in the first line thereof, the words "or community," and by inserting after the word "discrimination," in the second line thereof, the words "or unjust or unreasonable rate," and by adding to said section the following: "The Corporation Commission shall have authority to employ counsel whenever and for such periods of time as in their judgment it is necessary to do so, and counsel so employed shall be paid such fee and compensation as may be agreed upon by them."

SEC. 6. All persons and corporations affected by this act shall have the same right of appeal from the action of the Corporation Commission under the powers contained in this act as are now provided by law.

SEC. 7. That subsection nine of section two thousand five hundred and sixty-seven of the Revisal of one thousand nine hundred and five be and is hereby repealed.

SEC. 8. That this act shall be in force from and after its ratification.

In the General Assembly read three times, and ratified this the 11th day of March, A. D. 1907.

Received at Raleigh, N. C., May 9, 1907 and executed this May 9, 1907 by delivering a copy of within Bill of Complaint to Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield at their office Raleigh, N. C. and on May 10, 1907 executed on Rob't D. Gilmer and Hayden Clements, by delivering a copy of within Bill

of Complaint to Miss Sarah Burkhead, stenographer of said parties at office of Attorney General Raleigh, N. C.

CLAUDIUS DOCKERY,
U. S. Marshal,
Per E. A. MITCHELL, *O. D. M.*

Marshal's cost $10.00.

Returned and filed May 10th, 1907.
H. L. GRANT, *Clerk.*

80 In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

SOUTHERN RAILWAY COMPANY
versus
FRANKLIN MCNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, ROBERT D. GILMER, and HAYDEN CLEMENT.

Answer.

Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, Robert D. Gilmer, Hayden Clement, Defendants.

Robert D. Gilmer, Attorney-General.

Hayden Clement, Assistant Attorney-General.

James E. Shepherd, F. A. Woodard, R. W. Winston, Victor S. Bryant, Walter E. Daniel, Counsel for Defendants.

81 In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

SOUTHERN RAILWAY COMPANY
versus
FRANKLIN MCNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, ROBERT D. GILMER, and HAYDEN CLEMENT.

Answer.

The defendants, Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, Robert D. Gilmer and Hayden Clement, now and at all times hereafter saving to themselves all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the bill of complaint herein, and also as to the jurisdiction of the Court as to all or some of the parties and to all or some of the subjects-matter named and set forth therein, and protesting that this is substantially a suit against the State of North Carolina, and against its consent, jointly and severally, answering, say:

(1)

That as to paragraphs 2 and 3 of the bill of complaint, they admit that the complainant under an act passed by the Legis-
82 lature of the State of Virginia became a corporation of that State sometime in 1894, and that the said act provided that

it should have the authority to lease, use, operate and consolidate with, or purchase, other railroads, either within or without the said State; but these defendants deny that any authority was ever granted by the State of North Carolina to the said complainant, whereby it could lease, use, operate or consolidate any of the railroad corporations of the State of North Carolina mentioned in the bill of complaint so as to exempt them from the right of the State to supervise, regulate and control the same, and especially to fix and prescribe rates for the carriage of freight and passengers over said roads, whether by fixing and prescribing maximum rates or otherwise: such power to fix and prescribe rates being entirely unlimited except as restricted by the Fourteenth Amendment to the Constitution of the United States; and also to provide penalties for the failure to furnish cars or for the violation of or failure to perform any other law or regulation provided by the general corporation laws of the State or any acts amendatory or supplementary thereto, or any rule of the North Carolina Corporation Commission made under authority of such laws.

(2)

The defendants admit that the complainant has been doing intra- and inter-state commerce as set forth in paragraph 4 of the bill. They also admit that the General Assembly of North Carolina, in March, 1907, passed the two acts set forth in paragraph five of said bill, which are respectively entitled, "An act to prevent unjust discrimination in freight rates and to fix the maximum charges therefor," and "An act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina."

83

(3)

The defendants admit the passage, in 1899, of "An act to establish the North Carolina Corporation Commission," mentioned in paragraph 6 of the bill, and also that certain amendments were made thereto, but do not admit that the said paragraph contains an accurate and complete summary of said laws. They therefore pray that for greater certainty said acts be consulted when they are relied upon or referred to by any party to this suit.

(4)

The defendants admit paragraph 7 of the bill, which sets forth the official positions of the defendants and their residence, that is to say, that the defendants Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield are the members of the North Carolina Corporation Commission, and that defendants Robert D. Gilmer is Attorney-General and Hayden Clement is Assistant Attorney-General.

(5)

(*a*)

The defendants, answering paragraph 8 of the bill of complaint, deny that the said "Act in Respect to Freight Rates" and the said

"Act in Respect to Passenger Rates" will have the effect of depriving the complainant of its property "without just compensation and without due process of law and to deny it the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States," as alleged in said bill; and they further say that in enacting the said laws the General Assembly was legitimately excercising the sovereign powers of the State of North Carolina, and

84 that these sovereign powers in respect to the said laws are entirely unlimited, except as restricted by the Fourteenth Amendment to the Federal Constitution; that, vested with these sovereign powers, the State is charged with corresponding duties of the gravest character, the performance of which is essential to the good government and the prosperity and happiness of its people; and, in view of its rapidly increasing population, the great development of its natural and agricultural resources and the tremendous multiplication of its commercial and industrial activities, and the marked discrimination in rates made by the complainant and other common carriers doing business in the State, it more than ever before became its duty to provide that no greater tax in the way of freight and passenger rates should be imposed upon its people by those undertaking to perform services of a public nature than is a just compensation for the value of such services; that fully appreciating this serious responsibility, the General Assembly, actuated, these defendants believe, solely by the foregoing considerations, and with no purpose whatever to do injustice to the complainant or other railroad corporations doing business within the State, and after hearing the representatives of complainant and of other railroads doing business in the State, and after due investigation, determined that the maximum rates fixed in said bills were fair and just alike to such corporations and the people; and the defendants aver that they are fair and just to complainant, and therefore valid and binding. And these defendants respectfully insist that the determination of the said legislative body, in the exercise of the sovereign powers of the State as aforesaid, should be respected and obeyed by the complainant until it shall have established its contention, in the language of the highest tribunal in the land, "clearly and beyond all doubt," and not by mere general averments or speculative theories based upon inaccurate statements and estimates as contained in the bill herein.

85 (*b*)

The defendants deny that the existing rates and charges in effect upon the complainant's lines in the State of North Carolina, and applicable to intrastate business in said State, are not higher than is just and reasonable, whether considered in respect to the value of the property used in the public intrastate service in said State, or in respect to the value of the service rendered to the shippers or to the travelers upon its lines, and allege that the passenger rates and some of the freight rates are excessive, unjust and unreasonable. They admit that the rates and charges now in use on complainant's lines in North Carolina are, in respect to the traffic covered by the "Act in Respect to Freight Rates," the sum of the present local

rates now established, prescribed or approved by the State Corporation Commission, less reduction of 10 per cent. of the said local rates, and they admit that the published passenger rates of the complainant, and the rates charged some of the passengers using its lines in intrastate traveling, are 3¼ cents per mile for first-class fare and 2¾ cents per mile for second-class fare, but they deny that all passengers pay these rates.

For more than twenty years, recognizing the well-established fact that lower rates increase passenger travel, the complainant and the Richmond and Danville Railroad Company, its predecessor, operating lines of railway in North Carolina, now operated by complainant, have offered and given the passengers a lower rate than that which they now allege to be a just and reasonable rate; that during said time, and now, the complainant and its predecessors have been selling, and the complainant is now offering for sale and selling over its lines within this State, thousand-mile tickets for general use at the rate of 2½ cents per mile; that during much of said
86 time, and now, the complainant has offered for sale and sold tickets over its line covered by the "Act in Respect to Passenger Rates" for less than the rate prescribed in said act; that now and for many years, from June 1st to October 31st of each year, that is, during five months of the year, the complainant sells and has been selling what it denominates "Season Tickets" over its line from points in eastern and central North Carolina, to Hickory, Connelly Springs, Waynesville, Morganton, Asheville, Brevard, Hendersonville, and other points on its line in western North Carolina, at a rate of 2 cents per mile, or approximately 2 cents per mile; a round-trip ticket for first-class passenger from Raleigh, North Carolina, to Waynesville in said State, a distance of 298 miles each way and covered only by complainant's lines, could be purchased for $12; a similar ticket can be purchased from Raleigh, North Carolina, to Asheville in said State, a distance of 271 miles, covered only by complainant's lines, for the sum of $10.90, and similar rates are offered by the complainant between the points in this State and points in western North Carolina; that special rates are given at other seasons of the year, and at all seasons for special occasions, and in many instances these rates are less than 2¼ cents per mile, and in others as low as or less than 2 cents per mile; that for many years complainant has been, and is now, selling to ministers of this State, numbering many individuals who travel much upon its lines, tickets good on first and second class passenger cars at the rate of 2 cents a mile; that as shown by complainant's sworn report to the North Carolina Corporation Commission for the year ending June 30, 1906 (the original of which and of all other reports referred to in this answer the defendants are ready to produce), the average pas-
87 senger rate over complainant's lines covered by said "Act in Respect to Passenger Rates" was .02508 cents per mile for pay passengers, and for the year ending June 30, 1904, it was .0239 per mile, and for the year ending June 30, 1905, it was .02386 per mile; and although much of its mileage extends into and through States and into sections not so thickly populated as the sec-

tions of North Carolina traversed by complainant's lines, its average passenger rate over its entire line for the year ending June 30, 1906, was only .0241 cents per mile for pay passengers; that the complainant and its predecessors in possession of, or leasing or controlling and operating the lines now leased or controlled and operated by the complainant, now is, and for many years has been giving free transportation to many individuals and families using its lines covered by said "Act in Respect to Passenger Rates;" that this discrimination in favor of individuals and families of North Carolina became so marked and fraught with so much danger to the Commonwealth that its Legislature in the year 1891, chapter 320, section 4, of the Public Laws of North Carolina for 1891, forbade the issuance of free passes except to certain classes; but notwithstanding said act, the complainant continued to issue free transportation to certain individuals in favor of whom it desired to make discrimination, and in order to prevent the complainant violating this law, it was indicted in the courts of North Carolina and fined; but nevertheless, complainant is now furnishing to many individuals, not the objects of charity, but usually men, or the members of families of men of large influence or means, or controlling much freight traffic, free transportation over its lines in North Carolina; that it is impossible for the defendants to state the exact number of passengers carried free by the complainant during the period from June 30,
88 1905, to June 30, 1906, or during any one of the recent years, but they are informed and believe that the number of passengers and the distance which they are carried by complainant without charge is considerable; that should the complainant cease to make these discriminations and charge all those using its lines the rates fixed by the Legislature of North Carolina of 1907, in the "Act in Respect to Passenger Rates," its receipts for passenger service in the State would not be so much reduced by said act, even though the reduction of the rates prescribed in said act did not result in increasing the number of passengers using complainant's lines.

That while defendants are not informed as to discriminations made by the complainant in intrastate freight business, they know that now, and since its incorporation in the State of Virginia in the year 1894, the complainant has discriminated in freight rates against the citizens and shippers doing business in the State of North Carolina and has given the citizens and shippers doing business in the State of Virginia a more favorable freight rate than it has accorded to the citizens and shippers of North Carolina, and this is made more fully to appear in defendants' answer to paragraph 12 of complainant's Bill of Complaint herein.

(c)

While denying that the experience of the year ending June 30, 1906, or of previous years, is at all conclusive as to what it may be in the future with its rapidly changing conditions, the defendants nevertheless deny the accuracy of the statements contained in said bill and the inferences or deductions therefrom. They further say that such statements are not in accord with the complainant's sworn

reports to the Corporation Commission, which, so far from showing that an application of the rates complained of to the intrastate business for the year ending June 30, 1906, would have reduced
89 the income to a confiscatory amount, will demonstrate that on such a basis the income for said year would have been considerably in excess of a just compensation for the value of the service rendered or the use of the property employed. And for a more detailed answer to said statements, estimates and deductions of the complainant in this respect, the defendants say it is not true, as stated in the bill, that "the maximum earnings from the intrastate traffic in North Carolina, after paying the costs of operation for said year," amounted to only $453,811.41. On the contrary, as appears from said reports, the maximum earnings, after paying the costs of operation for said year, amounted to $823,546.80, and this is shown by the sworn report of the complainant to the defendant Corporation Commission, dated the 19th day of November, 1906. Deducting from this amount, as claimed in the bill of complaint, the sum of $74,423.73 for taxes and $54,633.04 for betterments, the maximum net earnings on intrastate business for said year would be $694,490.03. This would produce an income of 9 3/5 per cent. on $7,213,322.74—the proportionate value of the property used in intrastate business, according to the assessed value of the whole, $26,134,865, as estimated in the bill of complaint. Even assuming (which is denied) that the effect of the rates provided in the said acts of the Legislature would have reduced the net earnings to the extent of $296,747.17, there would still be left net earnings to the amount of $397,742.86, instead of $828,007.47, as claimed in the bill, and this would yield an income of 5½ per cent. on the value aforesaid.

(*d*)

The defendants further say that the percentage of income of 5½ per cent. above mentioned, is considerably above the percentage of the actual net income, which is, according to complainant's
90 reports, more than 9 per cent. on the assessed value of the property employed in intrastate commerce. This result is reached as follows: It appears from the report of the complainant that the gross earnings in the State, including freight, passenger, express, mail and miscellaneous earnings, were $3,159,156.89, and that the operating expenses charged against such intrastate traffic were $2,335,610.09. This amount so charged against intrastate traffic for operating expenses is clearly erroneous, and this appears from the reports, which show that the percentage of operating expenses on lines owned and leased by complainant would be, according to the following table, which is based upon the said reports:

	Gross Earnings.	Percentage.	Net Earnings.
Southern Railway.....	$1,206,705.68	57.75	$696,872.53
A. & C. Air Line.....	84,861.38	72.31	61,363.27
A. & Yadkin.....	275,362.75	79.92	220,059.91
H. P. R. A. & S.....	61,940.21	57.36	35,522.71
North Carolina R. R...	1,176,507.66	66.43	781,554.04
N. C. Midland.....	111,076.72	58.59	65,190.93
Southern Ry.—Carolina Div	123,498.57	100.12	123,646.76
State University.....	11,335.09	115.06	13,042.15
Yadkin Railroad.....	107,868.83	66.26	71,473.89
Total	$3,159,155.89	65.48	$2,068,726.19

The result being that the amount chargeable against the intrastate traffic should have been only $2,068,726.19, instead of $2,336,610, thus making the net earnings $1,080,420, instead of $823,346, as above stated. Upon the foregoing basis of correction the maximum actual net earnings from intrastate business in North Carolina, after deducting $74,423.73 taxes and $54,633.04 for betterments, would be $951,363.23, instead of $324,764.64, as stated in the bill. If by the acts complained of, the reduction in the net earnings would have been $296,747.17, there would still have been left $654,616.06 net earnings, instead of $28,007.47, as claimed by complainant. This would have been more than 9 per
91 cent. of the assessed value of so much of the complainant's property as is used in intrastate commerce in North Carolina, and would yield a fair profit even if the value of the property is greatly in excess of its assessed value.

The foregoing percentages as appear in the above table are reached by eliminating from the operating expenses as reported by the complainant, the item of taxes, which was considered by the complainant in estimating the percentages reported for each company owned or operated by it. Such taxes are no part of the operating expenses, and the bill of complaint herein also excludes them as such operating expenses.

(*c*)

The defendants, in further support of the reasonableness of the rates complained of, say that, as appears from the reports of the complainant to the defendant Commission, the earnings, inter- and intrastate, were for the year ending June 30, 1906, as set forth in the following table, and that the operating expenses and taxes were as set forth in said table:

Southern Railway Company.

Inter- and Intrastate in North Carolina.

Freight earnings	$8,520,201.29
Passenger earnings	3,439,144.56
Other sources	60,964.31
Total	$12,020,310.16
Operating expenses	7,761,935.23
Net earnings from operation	$4,258,374.93
Less taxes	271,156.80
Net after paying taxes	$3,967,218.13

The defendants say that, assuming that the loss of income by reason of the acts complained of will be the sum of $296,747.17, as alleged by the complainant, there would still be left net
92 earnings from complainant's business in North Carolina of $3,690,470.96, which would equal 14 per cent. of the assessed valuation of complainant's property in North Carolina.

(*f*)

The defendants further say the percentage of profit as above estimated would have been much greater, if it be true, as they are informed, that large sums have been expended by complainant in extravagant salaries, and for the purpose of promoting or preventing legislation by the employment of lobbyists and newspapers, also investments in newspapers and money paid to correspondents, and for other improper purposes. And defendants pray that these matters may be inquired into.

The defendants further allege that, as appears from the statement of said complainant filed with the Corporation Commission, the complainant paid for the year ending June 30, 1906, on account of injuries to persons, $860,335.53; on account of loss of property and damage to same, $1,199,848.17; for clearing wrecks, $137,746.35. The liability for these sums was incurred by reason of the negligent management of complainant, and that no part of said sums should be charged to the operating expenses of complainant, as defendants are advised.

They are informed and believe that during said year the complainant paid large sums of money for penalties incurred by its negligence in forwarding freight received for shipment. That no part of this amount so paid should be charged to the operating expenses of complainant, as defendants are advised.

The defendants further allege that the complainant paid for the fiscal year ending June 30, 1906, $571,248.46 on account of expense of outside agencies, etc., and the sum of $101,295.68 for advertising. That these amounts were expended by complainant on

account of its interstate business, and no part of said sum
93 should be charged to the account of the intrastate business.

The defendants further allege that the expense of operating the trains of the complainant will be greatly reduced by the provisions of the act reducing passenger rates, permitting the complainant to charge a single fare, thereby rendering it unnecessary for the complainant to furnish more than one class of cars for the use of its passengers. That for many years the complainants have been insisting that they be granted this privilege, alleging that their operating expenses would thereby be greatly reduced.

(*g*)

The defendants say that they have reason to believe, and so aver, that because of the increase of population and development and of reduced rates, the business of complainant will be greatly increased, and this with a comparatively small increase in operating expenses, and that from this source the percentage of profit above mentioned will be much greater; the defendants therefore further say that it is not true, as alleged by the complainant, that its operating expenses have, since June 30, 1906, increased "relatively far more than the gross earnings, and that the net results will be even more unfavorable and yield a still smaller return to the complainant than is here shown for the year ending June 30, 1907," but on the contrary, as above stated, they say that the above net earnings will be increased to a considerable amount. The defendants, therefore, further answering the specific allegations, say that it is not true, as alleged in said paragraph 8, that there will be "no compensatory increase in the business or tonnage of this complainant resulting from the reduced rates, and that there will be no appreciable or substantial increase whatever in such business or tonnage due to such reduced
rates"; on the contrary, the general experience is, as was
94 said by the Supreme Court of the United States, that a reduction of rates will result in an increase in business.

Further answering paragraph 8 of the bill herein, the defendants are informed and believe that it is not true, as alleged, that the lines of this complainant "have at all times been operated as economically as practicable under the existing conditions, and its operating expenses have at all times, under the conditions confronting it, been as reasonably low in amount as they could be made by economical and judicious management, and it has not been possible under the existing conditions for the complainant to operate its road for less than it has been operated," and that "in all respects it has confined its operating expenses, its taxes, its interest and every other expenditure within the lowest and narrowest limit reasonably practicable under the existing conditions"; and the defendants again deny that the results of "the aforesaid rate and charges would be to deprive this complainant of its property without just compensation and to deprive it of the equal protection of the laws, and to take its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States." The defendants further say, in support of the allegations as to the increase of

business and income of complainant, that, as appears from the reports of complainant to the Corporation Commission, the passenger earnings for the year 1906 increased over the year 1905 $156,549.34, and the freight earnings increased for the same period $654,394.82 upon its own lines, and that the freight and passenger earnings on its own and leased lines for the same period increased $831,232.59. As further illustrating the increase of the earnings of the complainant, the defendants say that it appears in the said report to
95 the Corporation Commission that the total earnings for the year 1902 upon its own and leased lines were $7,956,709.34, and total earnings for the year 1906 upon its own and leased lines were $12,020,310.16. That the per cent. of expenses to earnings for 1902 was 62.14, for 1905 was 58., for 1906 was 57.75, showing that the increase in the earnings upon its own and leased lines from 1902 to 1906 have been $4,063,600.82; that the per cent. of expenses to earnings were less than they were in 1902.

(*h*)

The defendants, further answering said paragraph, say that they do not know whether the real and legal bonded indebtedness of the complainant is as stated in the bill; and they further say that they are informed and believe that it was greatly in excess of the value of the property; and they are further informed and believe that much of the stock upon which dividends is claimed is watered, and does not represent the true value of the corporate property. They further say that the bonded indebtedness and amount of stock, etc., are merely some of the elements to be considered in determining the value of the property, and that when that value has been determined, the justness of the income is to be tested by that alone, and not by the amount of indebtedness, the interest thereon, the right to dividends upon stock, or other considerations of like character.

The defendants reiterate that upon the value of the service and of the property employed, the complainant's right to a just compensation will not be impaired by the provisions of the acts above mentioned.

(*i*)

Further answering paragraph 8 of the bill of complaint, the defendants admit the passage by the Legislature of the several acts mentioned therein. The acts in relation to the assessment of real
96 estate in stock-law territory is just and in accord with the laws of other States, as well as a just application of the rule that the burdens of government should be equally imposed upon all persons owning property, whether natural or artificial. The act prescribing the hours of service of employees engaged in the operation of trains is not only just and humane to those employed, but is necessary for the protection of the lives of the traveling public; and so far from being a burden upon the complainant, will result not only in the safety of life, but in avoiding heavy damages occasioned by overworked employees engaged in such a

dangerous and responsible occupation. The act requiring railroads to erect and maintain union depots in towns of 2,000 inhabitants is a just and reasonable response to the demand of the traveling public, and is generally required as such in all States and countries abreast with the progress of the age. It can impose but little burden upon the complainant, as some of the larger cities already have union depots, and in others, like Greensboro, High Point, Salisbury, Lexington, Concord and Asheville, the complainant has no competition, and there is no need of union stations. Outside of these cities there are very few towns on complainant's lines of 2,000 inhabitants to which the act would be applicable. The defendants deny that these acts will be oppressive or burdensome to the complainant, or materially affect its net earnings.

(6)

Answering paragraph 9 of the bill, the defendants admit that the defendant Commissioners established rates prior to March, 1907; but they deny that a reduction of the same as provided by the acts complained of would be unreasonable or unjust, and, in respect to the net earnings upon the basis of the maximums provided in said acts, they refer to paragraph 5 of this answer, showing that
97 even according to complainant's reports the net earnings would be over 9 per cent. upon the value of the property employed. The defendants also deny that "since the rates were so fixed by the Commissioners, the cost of performing the service by the complainant has largely increased, and in consequence thereof the said rates should, in order to be now just and reasonable, be increased, instead of being decreased." Defendants in this respect refer to said paragraph 5 of this answer.

(7)

The defendants, answering paragraph 10 of the bill herein, deny the same, and in respect to rates and discriminations they refer to subdivision 6, paragraph 5, of this answer.

(8)

The defendants, answering paragraph 11 of the bill herein, deny the allegations of fact contained therein, and are advised that the conclusions of law stated therein are erroneous.

(9)

Answering paragraph 12 of the bill of complaint the defendants deny that complainant's existing "rate fabric is properly adjusted in its relation between its intrastate rates and its interstate rates in North Carolina and in other States and that all of these charges, with perhaps trifling and negligible exceptions—exceptions which, if they exist, are entirely unimportant in the present connection—are just and reasonable in themselves, and do not and will not give to this complainant more than a just and reasonable return upon the

value of its property used in the transportation service which it renders to the public; and that any reduction in its revenue will seriously embarrass and obstruct it in providing, and will deprive it of its power to properly provide, the facilities which the public
98 commerce dependent upon it for transportation absolutely requires for the movement of traffic, both intra- and interstate." While the defendants admit that no State has a right to require that its own commerce between points within the State shall be given a preferential service, or shall be carried at preferential and lower rates than other commerce, yet they are advised that any State has a right to fix and prescribe just and reasonable rates for carrying intrastate freight and passengers. They are advised that the State of North Carolina is not required to submit to unjust, unreasonable, or extortionate intrastate freight and passenger rates, because the complainant is willing to impose such rates upon its citizens or citizens of other States, or because unjust, unreasonable and extortionate rates are in force in other States; and the defendants deny that the effect of the rates proposed to be put into effect pursuant to the acts of the General Assembly of North Carolina, referred to in the bill of complaint herein, will be to destroy the proper adjustment of complainant's intrastate rates in North Carolina, its intrastate rates generally and its intrastate rates in other States, and to require that preference be given to the complainant and undue discrimination exercised by it, in favor of the intrastate traffic in North Carolina over the intrastate traffic carried by the complainant in other States, and they deny that the Legislature of North Carolina has done, or that these defendants seek to do, anything to so regulate and burden intrastate commerce as to violate the commerce clause of the Constitution of the United States. And these defendants further say that the effect of the "Act in Respect to Freight Rates" and the "Act in Respect to Passenger Rates," referred to in the bill of complaint herein, will have a tendency to free the citizens of the State from and remove the discrimination as to freight and passenger rates imposed now
99 and for many years prior to this time by the complainant herein, and other common carriers acting in concert with it, upon the citizens of this State and others traveling and doing business within its borders. And these defendants say that now and since its organization the complainant has discriminated against North Carolina in both passenger and freight rates, particularly against it in the matter of freight rates, and in this manner has aided in building up the business of individuals and corporations doing business in towns and cities in the adjoining State of Virginia, under the laws of which complainant has been incorporated and organized, and also in building up and promoting the growth of towns and cities in the adjoining State of Virginia, and diverting from North Carolina business that properly belonged to this State; that as an illustration of this discrimination, these defendants say that grain may be shipped from Louisville, in the State of Kentucky, over complainant's lines through Greensboro, in this State, to Lynchburg, in the State of Virginia, for 17½ cents, while the same ship-

ment stopped at Greensboro, 114 miles nearer on complainant's line, costs the buyer or shipper 28 cents.

The rate from Bluefield, West Virginia, to Cincinnati, Ohio, a distance of 350 miles, on a ton of coal is $1.15; from Bluefield, West Virginia, to Greensboro, North Carolina, a distance of 360 miles, the rate is $2.30. The rate on freight shipments from Lynchburg, Virginia, to Louisville, Kentucky, are for the various classes of freight in their order 54 cents, 47 cents, 38 cents, 25 cents, 22 cents, and 18 cents for 100 pounds; for the same class of freight shipped from Greensboro to Louisville (a distance of 114 miles less than the distance from Lynchburg to Louisville) the rates are $1.15, 98 cents, 80 cents, 57 cents, 50 cents, and 39 cents for 100 pounds. So marked and great has been this discrimination that the manu-
100 facturers doing business in North Carolina along the line of complainant have found it necessary, in order to market their goods and compete with other manufacturers, to ship goods to other States south of North Carolina and have them reshipped over complainant's line through the State and through the points of manufacture to points in other States situated north of North Carolina; that goods manufactured in North Carolina can in some instances be shipped to New York City and then back to points in this State for less than the cost of shipment of the same goods direct from the point of manufacture to selling points in North Carolina, though the distance by way of New York is, of course, much greater; that this condition has become so intolerable and burdensome as to drive some of the citizens out of business in this State, and to compel others to leave this State and enter business elsewhere in order to secure a more favorable freight rate, while still other citizens have sought, and are still seeking, relief before the Corporation Commission of this State and before the Interstate Commerce Commission of the United States.

(10)

Answering paragraph 13 of the bill, the defendants admit the passage of the "Act in Respect to Freight Rates," but do not admit the accuracy of the complainant's summary of the same, and request that the act itself be consulted when referred to by any party to this suit. The defendants are advised that the said section 3 of said act in respect to the furnishing of cars is not a regulation of interstate commerce and does not violate "the commerce clause" of the Federal Constitution, as alleged. These defendants further say that no duties are imposed upon them in respect to their enforcement of said section.

101 (11)

Answering paragraph 14 of the bill, the defendants again admit the passage of the "Act in Respect to Freight Rates," but do not admit the accuracy of the complainant's summary of the same, and request that the act itself be consulted when referred to by any party to this suit. The defendants deny all of this paragraph except the passage of the act aforesaid. The defendants further say that no

duties are imposed upon them in respect to the enforcement of said acts.

(12)

Answering paragraph 15 of the bill, the defendants admit the passage of said act in respect to passenger rates, but for greater accuracy refer to the act as published for the provisions of section 3 thereof. These defendants are advised that the conclusions of law stated in said paragraph are erroneous, and they further say that they are informed and believe that the complainant has voluntarily entered into an agreement with other lines operating in this State to issue, and does issue, interchangeable mileage-books.

(13)

Answering paragraph 16 of the bill of complaint, the defendants deny the allegations of facts therein stated, and are advised that the conclusions of law therein stated are erroneous.

(14)

The defendants, answering paragraph 17 of the bill of complaint, deny that any special duty is imposed by the law of the State or by the two acts complained of, upon the defendants, the Attorney-General and the Assistant Attorney-General, in respect to the enforcement of said acts; and they deny that any duties are imposed
102 by said laws upon the defendant Commission in respect to the enforcement of the "Act in Respect to Freight Rates" and the "Act in Respect to Passenger Rates," other than are provided in said acts. The defendant Commissioners admit that it is their intention to discharge the duties so imposed, but deny the remainder of said paragraph, except as hereinafter admitted.

(15)

As to paragraph 18 of the bill, the defendants are unable to say what amount is involved in this suit, and demand strict proof that it is as alleged by complainant. Defendants, considering the foregoing answer, deny that any constitutional right of the complainant is involved in this suit.

(16)

Answering the 19th paragraph of the bill of complaint, the defendants deny the right of the complainant to obstruct and interfere with the execution of the aforesaid laws of the State, either by restraining order, or injunction, or in any respect whatever, and this without reference to its consent to the arrangement proposed in said paragraph as to refunding any amounts illegally charged and collected. The defendants respectfully say that said laws are valid in all respects, and that no restraint whatever should be imposed upon their instant execution.

(17)

The defendants deny paragraph 20 of the bill of complaint.

Further Answering.

(*a*)

And more particularly answering, the defendants say that no duty whatever is imposed by either of the said acts upon the defendants, the Attorney-General and the Assistant Attorney-General,
103 other than is imposed in respect to the general criminal laws of North Carolina. The said acts simply provide that their violation shall constitute a misdemeanor and be punishable by fine or imprisonment at the discretion of the Court. The only penalties prescribed by said acts are given to and suable for by the parties aggrieved. The defendants repeat that the Attorney- and Assistant Attorney-General are charged with no special duty by laws of this State in respect to the enforcement of said acts, and that the same are self-executing so far as the said defendants are concerned, and that as to them this suit is a suit against the State of North Carolina, and against its consent, and contrary to the Eleventh Amendment to the Constitution of the United States. If the complainant should be prosecuted under these statutes, it has, according to the law, as declared by the Supreme Court of the United States, an opportunity of defending on the ground that the statute is void, and the fact that it may frequently be prosecuted constitutes no ground for the interference of a Federal court of equity.

(*b*)

The defendants further say that the "Act in Respect to Passenger Rates" is not dependent in any manner, in respect to its operation, upon any act or thing which the defendant Commission may or may not do. It is positive, unconditional, and self-executing in its provisions, and its violation subjects the carrier to the indictment and the penalties above mentioned. The statute itself fixes the rate, and not the Commission, and as to such rate the said defendants have no special duty to perform in order that it may become a law, and, being thus self-executing, this suit is substantially a suit against the State of North Carolina, and against its consent, and contrary to the Eleventh Amendment to the Constitution of the United
104 States. If the complainant should be prosecuted under the said statute it can, as above stated, interpose the defense that it is void, and cannot, therefore, resort to a Federal court of equity for relief. The defendants further submit to the Court whether the same objections do not apply to the "Act in Respect to Freight Rates" so far as the fixing of maximum amounts are concerned.

And for further defense:

The defendants deny that the facts stated in the bill, and especially when considered in connection with the said reports of the complainant, make out a case authorizing or calling for the interference of a court of equity; and the defendants say that if the complainant

is ever aggrieved by the said legislation it has ample remedy at law; and defendants further say that because of the self-executing character of the acts as above set forth, and on other grounds, there is no equity in the bill of complaint herein.

Wherefore, the defendants pray that the restraining order heretofore granted be vacated, that this suit be dismissed, and that the defendants recover their costs.

FRANKLIN McNEILL,
SAMUEL L. ROGERS,
EUGENE C. BEDDINGFIELD,
ROBERT D. GILMER,
HAYDEN CLEMENT, *Defendants.*

ROBERT D. GILMER,
Attorney-General.
HAYDEN CLEMENT,
Assistant Attorney-General.

JAMES E. SHEPHERD,
F. A. WOODARD,
R. W. WINSTON,
VICTOR S. BRYANT,
WALTER E. DANIEL,
Counsel for Defendants.

105 UNITED STATES OF AMERICA, *State of North Carolina:*

Personally appeared before me, —— —— a notary public duly commissioned and qualified and acting as such for the State of North Carolina, Franklin McNeill, who, being duly sworn, deposes and says that he is Chairman of the North Carolina Corporation Commission and a defendant in the above-entitled suit; that he has read the foregoing answer and knows the contents thereof; that the facts therein stated, as of affiant's own knowledge, are true; and that the facts stated upon affiant's information and belief, he believes to be true.

—— ——.

Sworn to and subscribed before me, this — day of June, 1907.
My commission as notary expires on — day of —— 190–.
(Signed)
—— ——,
Notary Public.

106 *Plea of Defendants.*

U. S. Circuit Court. Filed Jul- 19, 1907. W. S. Hyams, Clerk.

NORTH CAROLINA, *Buncombe County, City of Asheville:*

Police Justice's Court.

STATE
vs.
J. H. WOOD and O. C. WILSON.

Plea of Defendants.

Now comes the defendants, J. H. Wood and O. C. Wilson, being brought to the bar of the Court in their own proper persons by the Sheriff of Buncombe County, North Carolina, in whose custody they are, and says, and each for himself says:

1.

That he is not guilty of the charge contained in the warrant heretofore herein issued against him.

2.

That this Court has no jurisdiction of the offense charged against him in the warrant heretofore issued herein against him.

3.

That he is so in the custody of the said Sheriff of Buncombe County, North Carolina, and held at the bar of this Court to answer to the charge contained in said warrant as aforesaid in violation of the constitution and laws of the United States, and for an act done by him in pursuance of a decree of the Circuit Court of the United States.

And he specially further pleads:—

107 *Writ of Habeas Corpus.*

U. S. Circuit Court. Filed Jul- 19, 1907. W. S. Hyams, Clerk.

No. 572, Original.

UNITED STATES OF AMERICA, *Western District of North Carolina:*

In the Matter of the Application of JAMES H. WOOD for Writ of *Habeas Corpus.*

The President of the United States of America to Thomas F. Hunter, Greeting:

We command you that you have the body of James H. Wood by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name

said James H. Wood shall be called or charged, before me at Asheville, North Carolina forthwith, to do and receive what shall then and there be considered concerning said James H. Wood, and have you then and there this writ.

Witness Honorable Melville W. Fuller, Chief Justice of the United States this the 18th day of July, 1907.

W. S. HYAMS,
Clerk United States Circuit Court,
By M. L. RORISON, *Deputy.*

[SEAL.]

In the Matter of —— ——.

Writ of Habeas Corpus.

Let the within Writ issue.

J. C. PRITCHARD,
U. S. Circuit Judge.

Received July 19, 1907 and served on the 19th day of July 1907 by delivering to T. F. Hunter, Sheriff of Buncombe Co., N. C. the original Writ, of which this is a Duplicate, together with a copy of the petition and accompanying exhibits.

J. M. MILLIKAN,
U. S. Marshal,
By R. S. RAMSEY, *D. M.*

Fees $2.00.

108 *Answer of Thomas F. Hunter, Sheriff of Buncombe County.*

Filed in This Office July 19, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina.

In the Matter of the Application of JAMES H. WOOD for Writ of *Habeas Corpus.*

Thomas F. Hunter answering the Writ of *habeas corpus* issued in the above entitled matter by the Honorable J. C. Pritchard, Circuit Judge of the United States, on the 18th day of July, 1907, says:—

That he is the Sheriff of the County of Buncombe, and holds in his custody the petitioner by virtue of a mittimus issued by the Honorable G. S. Reynolds, Police Justice of the Police Court of the City of Asheville, county of Buncombe and State of North Carolina, a copy of which is attached to the petition filed by the petitioner; that he is advised, informed and believes that it was his duty to arrest and hold the said petitioner under said process issued by the said Court aforesaid, and is advised and believes that the said commitment is regular and lawful in all respects, and not

in violation of the Constitution of North Carolina nor of the United States; that he is advised and believes that the petition of the petitioner should be denied, and that he is not entitled to any discharge from the custody of the respondent.

Your respondent conceiving that he has no discretion in the matter holds and detains the petitioner in his custody as by the said precept he is commanded to do.

Your respondent is advised and believes that the Court — pronounced sentence against the petitioner and issued the — hereinbefore mentioned had jurisdiction of the offense charged in the warrant; that his detention is not in violation of the Constitution and laws of the United States, as this respondent is advised and believes, nor is the same in violation of any decree of the Circuit
109 Court of the United States, as this respondent is advised and believes, but the arrest of the petitioner and his conviction and sentence was for a violation of an Act of the General Assembly of North Carolina, and said detention is regular and lawful.

Your respondent is advised and believes that so much of the decree of the Circuit Court of the United States as undertakes to restrain and enjoin all individuals not connected with the suit mentioned in Exhibit C. to this petition of the petitioner was *coram non judice*, and the said judgment in respect of the proceeding under which this respondent holds the petitioner is of no effect, and not enforceable, if there is such suit or decree.

Your respondent avers on information and belief that the petitioner in this cause is able to procure any bail which any court would demand, pending an appeal of this cause, and he is advised and believes that there is no reason why the petitioner should be discharged from his custody, and he asks the Court to make an order directing the Marshal to return to his custody said petitioner to the end that this respondent may fully execute the precept in his hand.

And having fully answered as fully as he is advised that it is necessary for him to do he prays that he be hence dismissed, and that he recover his costs in this behalf most unjustly incurred.

[SEAL.] MERRIMON & MERRIMON,
Attorneys for Respondent.

T. F. Hunter being duly sworn says: That he has heard read the foregoing answer and knows the contents thereof, that the same is true of his own knowledge except as to matters and things therein alleged on information and belief and as to those he believes it to be true.

T. F. HUNTER.

Sworn to before me this July 19, 1907.

W. S. HYAMS, *Clerk*,
By M. L. RORISON, *Deputy*.

Endorsed: *In re* Jas H. Wood.

110 *Replication of Southern Railway Company.*

Filed before Judge Pritchard June 29, 1907. E. J. Best.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,

v.

FRANKLIN MCNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, ROBERT D. GILMER, and HAYDEN CLEMENT, Defendants.

The Replication of the Above Named Complainant to the Joint and Separate Answer of All the Above Named Defendants.

This replicant saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the joint and separate answer of said defendants, for replication thereunto, sayeth that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants is very uncertain, evasive and insufficient in the law to be replied unto by this replicant, without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable court shall direct and humbly — as in and by its said bill it has already prayed.

C. B. NORTHROP,
W. B. RODMAN,
JOHN H. BUSBEE,
JOHN K. GRAVES,
Solicitors for Complainant.

ALFRED P. THOM,
Of Counsel.

Endorsed: Southern Ry. Co. *vs.* Franklin McNeill *et al.* Replication of Southern Ry. Co.

111 *Restraining Order Bond.*

Filed June 29th, 1907. H. L. Grant, Clerk.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,

v.

FRANKLIN McNEILL ET ALS., Defendants.

Know all men by these presents, that Southern Railway Company, a corporation of the State of Virginia, the principal office of which is in the city of Richmond in said state, as Principal and The United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto the United States of America in the just and full sum of Three Hundred and twenty-five Thousand dollars, for the payment of which well and truly to be made, we do hereby jointly and severally bind ourselves, and each of our successors, firmly by these presents:

Sealed with our seals, and dated this 29th day of June in the year 1907.

The condition of the above obligation is such that

Whereas an interlocutory decree has been made in the above entitled cause, by the terms of which Southern Railway Company, Complainant in the said cause, and principal in this bond, is ordered to execute a bond conditioned to pay into the registry of this Court, from time to time, when and as the said Court may so order, such sum or sums of money as shall be equal to the difference between the aggregate freight and passenger rates and excess baggage charges charged and received by it, for intrastate services on its lines in the State of North Carolina, and that would have been the aggregate amount for such services at the rates fixed in or under the act of the General Assembly, ratified on the 9th day of March, 1907, entitled "An Act to prevent unjust discrimination in freight rates and to fix the maximum charges therefor"; and the act of the General Assembly of the said state ratified the second day of

112 March, in the year 1907 entitled: "An Act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina;" and

Whereas it is ordered that the said Southern Railway Company shall preserve, to be produced whenever so ordered by the Court herein all cancelled tickets and excess baggage check stubs in respect to which such coupons or other written or printed evidence may have been issued and may be outstanding, and shall from time to time, report to the Court at intervals to be fixed by the order of the court herein, statements showing the revenue by it charged and collected for its services in the North Carolina interstate transportation of passengers and baggage and freight in excess of the amounts permitted by said act, in respect to passenger rates, and said act in

respect to freight rates, and as to each of said shipments or freight to report the name of the shipper, the date and place of shipment, and the amount of such excess; and

Whereas it is ordered that from time to time the said Southern Railway Company shall give such further bond or bonds as the Court may require, to secure the proper payment into the registry of the court, of all amounts which finally it shall be adjudged that it should so pay under the final decision in this cause:

Now, therefore, if the above named Southern Railway Company shall well and truly comply with each and every one of the above requirements of the said interlocutory decree and such other decree or decrees as this court may enter in this cause, and if the said Southern Railway Company shall pay, or cause to be paid, all damages caused by the issue of said interlocutory injunction and the costs of this cause in connection therewith, in the event that the said interlocutory injunction shall be dissolved or vacated as having been wrongfully issued, or because the said acts were improperly restrained, then this obligation to be null and void otherwise to be and remain in full force and effect.

In testimony whereof the parties hereto have caused these presents to be duly signed in their respective names and their respective seals to be hereunto affixed, this 29th day of June in the year 1907.

113 [Southern Railway Company Seal.]

SOUTHERN RAILWAY COMPANY,
By A. B. ANDREWS, *1st Vice President.*

[SEAL.] THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By ALFRED S. BARNARD,
Ag't & Att'y in Fact,
By PHILIP R. MOALE,
Agent and Attorney in Fact.
Attorney in Fact.

Approved,
H. L. GRANT, *Clerk.*
By GEO. L. TONNOFFSKI, *D. C.*

Endorsed on back: 295. Equity. Southern Railway Company *vs.* Franklin McNeill *et al.* Restraining Order Bond. Filed June 29th, 1907, H. L. Grant, Clerk.

114 *Decree Continuing Restraining Order & Appointing Standing Master.*

Filed June 29th, 1907. H. L. Brant, Clerk.

In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,

v.

FRANKLIN MCNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, ROBERT D. GILMER, and HAYDEN CLEMENT, Defendants.

Before Honorable J. C. Pritchard, Judge of said Court.

In pursuance of the order to show cause, made herein on the eighth day of May 1907, by which the said defendants were ordered to appear in the United States Court room at Asheville, North Carolina, at ten o'clock A. M. on Wednesday, the twenty-sixth day of June, 1907, to show cause, if any they had or could show, why an injunction *pendente lite*, as prayed in the bill, should not be issued, the defendants appeared in the said Court room at the time mentioned and filed their answer in writing to the said bill, and thereupon the complainant moved before the Judge of this Court for an interlocutory injunction as prayed in the said bill, and the said motion was heard upon the bill of complaint in this cause, and answer thereto, treated as affidavits, and upon the affidavits filed herein by the complainant, and the said motion was argued by counsel.

And the same having been fully considered, it is now ordered:

1. That until the further order of the Court herein, the defendants, Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield, constituting the Corporation Commission of North Carolina, and each of them individually and jointly as constituting the said Corporation Commission of North Carolina, and each and all of their successors in office, and their and each of their agents and employees, be, and they hereby are, enjoined and restrained from preparing or publishing the tariff of rates, charges and tolls mentioned in the fifth section of the act in the bill in this cause mentioned, entitled

"An Act to prevent unjust discrimination in freight rates
115 and to fix the maximum charges therefor," ratified March ninth, 1907, and hereinafter referred to as the "Act in respect to freight rates," and for classifying the railroads operating in North Carolina in accordance with, and from publishing the rates fixed by, an act of the General Assembly of North Carolina in the bill in this cause mentioned, entitled "An Act prescribing the maximum charges railroad Companies may make for transporting passengers in North Carolina, ratified March second, 1907, and hereinafter referred to as the "Act in respect to passenger rates," and from naming and designating the ticket offices in North Carolina at

which mileage books good on a line of this complainant shall be kept on sale.

2. That until the further order of the court herein, the defendants Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield, constituting the Corporation Commission of North Carolina, and each of them individually and jointly as constituting the said Corporation Commission of North Carolina, and each and all of their successors in office, and their and each of their attorneys, agents and employees, and the defendants Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, their and each of their successors in office, and their and each of their attorneys, agents and employees are, and each of them is, hereby restrained and enjoined from taking any step or steps in pursuance of said act in respect to freight rates, or of said Act in respect to passenger rates, or of any of the laws of the State of North Carolina, either directly, or by or through any other attorney, agent or employee or otherwise, or by any suit, prosecution or proceeding, civil or criminal, or in any other manner for the purpose of enforcing or endeavoring to put into effect as against the complainant or any of its officers, agents or employees, or to force the complainant, or any of its officers, agents or employees, to put into effect, said Act in respect to freight rates, or the said Act in respect to passenger rates, or any part of either of said acts, or the penalties prescribed or provided for, in either of said acts, or any other penalties or punishments
116 against the Complainant, Southern Railway Company, or against any of its officers, agents or employees for failure to put into effect, or to observe, on any of the lines of the said complainant in North Carolina the freight rates, or the passenger rates, prescribed or provided for, in said acts, or either of them, or for failure to comply with either of said acts, or with any provision of either of them.

3. That, until the further order of the Court herein, all other individuals and corporations are, and each of them is, hereby restrained and enjoined from instituting, or prosecuting, any suit or prosecution or other proceeding, either civil or criminal, against said complainant, or against any officer, agent or employee of said complainant for the recovery or imposition of any penalty or punishment, under or by virtue of said Act in respect to passenger rates, or the said act in respect to freight rates, or under or by virtue of any law of North Carolina, because of, or growing out of, the failure of the said Complainant or any of its officers, agents or employees, to put into effect, or to observe, on any of the lines of the complainant in North Carolina the freight rates or the passenger rates prescribed in said acts, or in either of them, or to comply with any of the provisions of either of said acts, or for the recovery of any damages or overcharges because of, or growing out of any such failure, or for the enforcement of any claim, alleged right or cause of action, growing out of or connected with, any such failure.

4. That said complainant, or some one for it, shall before a judge of this Court, or the clerk thereof, execute a bond in the penalty of three hundred and twenty five Thousand dollars, with surety to be

approved by such judge, or by such clerk, conditioned to pay into the registry of this court, from time to time, when and as the court may so order such sum or sums of money as shall be equal to the difference between the aggregate freight and passenger rates and excess baggage charges charged and received by it for intrastate services on its lines in the State of North Carolina, and what would have been the aggregate amount for such services at the rates fixed in or under the said Acts of Assembly, and further conditioned
117 that, whereas an interlocutory injunction has been issued in the above entitled cause, by the terms of which the defendants, and each of them, are restrained until the further order of the court, as from said order will appear, now should such interlocutory injunction be dissolved or vacated as having been wrongfully issued, or because the said acts were improperly restrained, then that the complainant shall pay, or cause to be paid, all damages caused by the issue of such interlocutory injunction and the costs of this cause in connection therewith.

5. That the complainant shall give to any person purchasing a ticket for intrastate travel on its lines in the State of North Carolina, and to any person purchasing a mileage book for travel on its lines in North Carolina, but not good outside of said State, a transferable coupon, or other written or printed evidence, representing the sum which such person, or his transferee, will, upon a final decision in this cause upholding the validity of the said act in respect to passenger rates, be entitled to receive, out of the cash deposit to be made, in the registry of this Court in pursuance of the obligation of the bond hereinbefore mentioned. The form of said coupon, or of other written or printed evidence, shall be substantially as follows:

SOUTHERN RAILWAY COMPANY.

"North Carolina Ticket Claim Coupon.

"To be Retained by Passenger. Not Good for Passage.

"Issued under an order of the Circuit Court of the United States for the Eastern District of North Carolina, in a suit therein pending between the Southern Railway Company, Complainant, and Franklin McNeill, *et al.* Defendants.

"Southern Railway Company has, on the date stamped hereon received in connection with the sale of the ticket of corresponding form and number, the rate designated in the tariff of this Company in effect on date of sale, for travel between points designated in such ticket within the State of North Carolina to which ticket this coupon is attached. This coupon is evidence only of a claim for the difference between the amount received and what would have been the amount if the distance covered by said ticket had been paid for at the rate fixed by North Carolina Act, approved March 2d, 1907, prescribing maximum passenger charges, and is payable only on the order and out of the registry of said court, upon surrender to the court of this coupon, and upon such conditions, if any, at said court

may impose, provided it should be finally determined in said suit that the said claim is entitled to such payment.

"In case the ticket with which this coupon corresponds is presented for redemption it must be presented at General Passenger Agent's office Washington, D. C. accompanied by this coupon, either for surrender or for appropriate notation."

118 And the complainant shall give to any person checking baggage to be carried by the complainant between two points, both of which are in the State of North Carolina, and which does not pass out of the State en route, and who has paid to the complainant any charge thereon for excess baggage a transferable coupon or other written or printed evidence representing the difference between the amount so paid and what would have been paid if there had been an allowance to such person of two hundred pounds of baggage as provided in said Act in respect to passenger rates, such difference to be payable to such person or to his transferee upon a final decision of this cause upholding the validity of such act in respect to passenger rates, out of the cash to be deposited in the registry of this Court, in pursuance of the obligation of the bond hereinbefore mentioned, such coupon, or other written or printed evidence shall be substantially in the following form:

SOUTHERN RAILWAY COMPANY.

Issued by Southern Railway Company.

"*North Carolina Excess Baggage Check.*

North Carolina Excess Baggage Claim Coupon.

To be Retained by Passenger.

"Issued under an order of the Circuit Court of the United States for the Eastern District of North Carolina, in a suit therein pending between Southern Railway Company, Complainant, and Franklin McNeill *et al.*, defendants.

"Southern Railway Company has received in connection with the issuance of excess baggage check of corresponding form and number, the amount computed from the excess baggage tariff of this Company in effect on July 1, 1907, for the transportation of the passenger's baggage in excess of 150 pounds in weight, between the points designated in such excess baggage check within the State of North Carolina, to which excess baggage check this coupon is attached.

"This coupon is evidence only of a claim for the difference between the amount received, and what would have been received had there been an allowance to the passenger of 200 pounds of baggage, as provided in the North Carolina Act, approved March 2, 1907; and is payable only on the order and out of the registry of said court, upon surrender to the Court of this coupon, and upon such conditions, if any, as said Court may impose, provided it should be finally determined in said suit that the said claim is entitled to such payment."

But nothing herein contained shall be construed as requiring the complainant to issue any such coupon, or any such other written or printed evidence, in connection with the sale of any mileage book or any ticket, good for an interstate passage or for passage in another State or in other states.

119 6. That the complainant shall preserve to be produced whenever so ordered by the Court herein all canceled tickets and excess baggage check stubs in respect to which such coupons or other written or printed evidence may have been issued, and may be outstanding, and shall from time to time report to the court at intervals to be fixed by an order of the Court herein, statements showing the revenue by it charged and collected for its services in the North Carolina intrastate transportation of passengers, baggage and freight in excess of the amounts permitted by said Act in respect to passenger rates, and said Act in respect to freight rates. As to each of such shipments of freight the complainant shall report the name of the shipper, the date and place of shipment and the amount of such excess. The complainant shall from time to time give such further bond or bonds as the court may require to secure the proper payment into the registry of the court of all the amounts which finally it shall be adjudged that it should pay, under the final decision of this cause.

7. If it shall be determined herein that the complainant is entitled to the amounts covered by said bond or bonds, then said bond or bonds, shall be released and canceled by the court, and if any amount shall have then been paid into the registry of the court pursuant thereto, then upon such determination in favor of the complainant, the sum or sums, so paid into the registry shall be repaid to the complainant without further order of the court herein.

8. Leave is hereby granted to the complainant, if it be so advised, to make the supplemental process, as new parties defendant, any person or corporation, attorney or solicitor, who may attempt or threaten to assert, or enforce against the complainant or against any of its officers, agents or employees, any alleged right, remedy, penalty or punishment, under either of said acts or otherwise, because of the failure of the complainant, or any of its officers, agents or employees, to put into effect, or to observe, any rate prescribed in said Act in respect to passenger rates, or in said Act in respect to freight rates, or any other provision of said acts, or either of them.

120 9. That the restraining order heretofore granted in this cause shall be construed as remaining in full force and effect until this interlocutory injunction shall take effect.

10. It is further ordered that a writ of injunction shall forthwith issue in accordance with this order.

11. The defendants, having by counsel in open court stated that they regard the answer filed on the said motion for an interlocutory injunction as their answer in this cause, and having given their consent that the same shall be so considered, and that the complainants shall forthwith file a replication thereto, and that the said cause shall be considered at issue, it is now ordered that it be referred to the Honorable W. A. Montgomery, Standing Master of this Court for the

Eastern District of North Carolina, to take and to the Court report such evidence on any of the issues herein as either party may offer, and to make all needed computations, and report fully to the court the facts thereon; that for that purpose the master shall have the right to sit from time to time in the City of Washington and at any point he may elect in the State of North Carolina or elsewhere, for the purpose of facilitating the taking of the said evidence, and the said hearing before him, and that he shall report to the court the said evidence and his findings thereon not later than the 25th day of September, 1907. The said Master shall determine what time is to be allotted to the complainant for the taking of its evidence and what time shall be allotted to the defendants for the taking of their evidence.

This cause, by consent of the parties hereto given in open court is set down for hearing before this Court in the City of Asheville on the first Monday of October in the year 1907.

12. Thereupon the complainant tendered its bond to comply with the provisions in respect to a bond in this order duly executed by the complainant as principal, and by the United States Fidelity & Guaranty Company as surety, which said bond and the execution thereof and the surety thereto are approved.

June 29th, 1907.

J. C. PRITCHARD,
U. S. Circuit Judge.

Endorsed: 295. Southern Railway Company *vs.* Franklin McNeill *et al.* Decree continuing restraining order and appointing standing master.

121 *Bond of Jas. H. Wood.*

U. S. Circuit Court. Filed Jul- 19, 1907. W. S. Hyams, Clerk.

UNITED STATES OF AMERICA, *Western District of North Carolina:*

Know all Men by these Presents, That we James H. Wood as Principal, and J. F. Hays as Sureties, are held and firmly bound unto the United States of America in the sum of Two Hundred ($200.00) Dollars, lawful money of the United States, to the payment whereof well and truly to be made, we hereby bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed and sealed with our seals, and dated at Asheville, N. C., this 19th day of July one thousand nine hundred and seven.

The condition of the foregoing obligation is such:

That if the above bounden James H. Wood shall make his personal appearance from day to day before His Honor, J. C. Pritchard, Circuit Judge at the Federal Court House at Asheville until the further order of the Court and not depart this Court without leave, then this obligation to be null and void; otherwise to remain in full force and effect.

JAMES H. WOOD, [SEAL.]
J. F. HAYS. [SEAL.]

Taken and acknowledged before me this 19 day of July A. D. 1907.

W. S. HYAMS,
Clerk U. S. District Court,
By M. L. RORISON, *Deputy.*

Justified.

Endorsed on back as follows to-wit: Oral Justification. No. 270 United States of America, Western District of North Carolina, J. H. Wood, Petitioner against Thomas Hunter, Buncombe County. Bond for Appearance, — term 190– At Asheville, N. C. Penalty $—.

122 EXHIBIT E.

Original.

No. 568.

In the Circuit Court of the United States for the Western District of North Carolina, to-wit:

In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
v.
FRANKLIN MCNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, ROBERT D. GILMER, and HAYDEN CLEMENT, J. A. SPENCE, ELIJAH MOFFITT, J. R. MCKENZIE, E. B. HATCH, W. C. HURLEY, F. A. HENLEY, W. M. HOOKER, CHAS. A. ARMSTRONG, L. F. NANCE, SPENCER HOWELL, ROBERT HOWELL, COON HOWELL, HENRY SMITHERMAN, JESSE ELDRIDGE, CLAUDE HOWELL, WALLACE ARMSTRONG, GUY SMITHERMAN, The Last Four Being Infants under the Age of Twenty-one Years, and J. M. WAY and B. C. BECKWITH, Defendants.

Ancillary Bill.

Moore & Rollins, F. H. Busbee, W. B. Rodman, John K Graves, Solicitors for Complainant.

Francis Lynde Stetson, Alex. P. Humphrey, Walker D. Hines, Alfred P. Thom, Of Counsel.

Office of U. S. Marshal, Raleigh, N. C. Jul- 20, 1907. U. S. Circuit Court. Filed Jul- 23, 1907. W. S. Hyams, Clerk.

123 In the Circuit Court of the United States for the Western District of North Carolina, to-wit:

In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
v.
FRANKLIN MCNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, ROBERT D. GILMER, and HAYDEN CLEMENT, J. A. SPENCE, ELIJAH MOFFITT, J. R. MCKENZIE, E. B. HATCH, W. C. HURLEY, F. A. HENLEY, W. M. HOOKER, CHAS. A. ARMSTRONG, L. F. NANCE, SPENCER HOWELL, ROBERT HOWELL, COON HOWELL, HENRY SMITHERMAN, JESSE ELDRIDGE, CLAUDE HOWELL, WALLACE ARMSTRONG, GUY SMITHERMAN, The Last Four Being Infants under the Age of Twenty-one Years, and J. M. WAY and B. C. BECKWITH, Defendants.

To the Honorable Judges of said Court:

The ancillary bill of complaint of Southern Railway Company, a corporation of the State of Virginia, duly organized and existing under and by virtue of the laws of the said State, having its principal office in the city of Richmond in the State of Virginia, and being a citizen of the said State, against Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, Robert D. Gilmer, and Hayden Clement, J. A. Spence, Elijah Moffitt, J. R. McKenzie, E. B. Hatch, W. C. Hurley, F. A. Henley, W. M. Hooker, Charles A. Armstrong, L. F. Nance, Spencer Howell, Robert Howell, Coon Howell, Henry Smitherman, Jesse Eldridge, Claude Howell, Wallace Armstrong, Guy Smitherman, the last four being infants under the age of twenty-one years, and J. M. Way and B. C. Beckwith, all of the defendants being citizens of the State of North Caro-
124 lina, and the defendants Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, Robert D. Gilmer, Hayden Clement and B. C. Beckwith being residents of the Eastern District, and J. A. Spence, Elijah Moffitt, J. R. McKenzie, E. B. Hatch, W. C. Hurley, F. A. Henley, W. M. Hooker, Charles A. Armstrong, L. F. Nance, Spencer Howell, Robert Howell, Coon Howell, Henry Smitherman, Jesse Eldridge, Claude Howell, Wallace Armstrong, Guy Smitherman, the last four being infants under the age of twenty-one years, and J. M. Way, being residents of the Western District of the said State of North Carolina.

And thereupon your complainant says:

1. The citizenship of the parties complainant and defendant is as above set forth.

2. That on the 8th day of May, 1907, your complainant filed in the Circuit Court of the United States for the Eastern District of North Carolina, an original bill of complaint wherein the Southern Railway Company was complainant and Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, Robert D. Gilmer and Hayden Clement were defendants, which said bill was in the words and figures as follows, to-wit:

125 In the Circuit Court of the United States for the Eastern District of North Carolina, to-wit:

In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
v.
FRANKLIN MCNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, ROBERT D. GILMER, and HAYDEN CLEMENT, Defendants.

To the Honorable Judges of said Court:

The bill of complaint of Southern Railway Company, a corporation of the State of Virginia, duly organized and existing under and by virtue of the laws of that State, having its principal office in the city of Richmond, in the State of Virginia, and being a citizen of said State, against Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, Robert D. Gilmer, and Hayden Clement, defendants, all of said defendants being citizens of the State of North Carolina.

And thereupon your complainant says:

1. The citizenship of the parties complainant and defendant is as above set forth.

2. That in the year 1894, under an act of the General Assembly of the State of Virginia, approved February 20, 1894, entitled "An Act authorizing the purchasers of the Richmond and Danville Railroad, their assigns and successors, to become and be a corporation, to adopt a name therefor, and to possess and exercise general power; and authorizing the leasing to or by, and the consolidation therewith of, other corporations," the complainant was duly incor-
126 porated and organized into a railroad corporation. A true copy of its said charter is herewith filed as a part of this bill, marked Exhibit No. 1.

3. That by the terms of its charter it was authorized to own, operate and control lines of railroad in other States as well as in Virginia, and under and by virtue of such powers, and under and by virtue of due authority from the States about to be mentioned, the complainant owns, or controls and operates, and continuously since its said organization has operated and controlled, lines of railroad (in addition to those which it owns, operates and controls in the State of Virginia) in the States of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, Kentucky, Indiana and Illinois. That portion of its road lying in the State of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi and Tennessee comprises lines 6989.12 miles in length and constitutes a continuous system of railroads, and that portion of its lines lying in the States of Kentucky, Indiana and Illinois comprises lines 526.73 miles in length and constitutes another continuous system of railroads. These two systems are not connected by rails owned by this complainant, but are connected

by traffic arrangement with another line of road. That portion of its road which it so owns, or controls and operates, in the State of North Carolina is 1,456.72 miles in length, and for a considerable number of years has been more than 1,400 miles.

4. That the complainant is, and continuously since its organization aforesaid has been, engaged in doing an intrastate business as a common carrier of freight and passengers in the State of North Carolina, and in addition is, and continuously since its said organization has been, engaged in doing, as a common carrier of freight and passengers, a large interstate business in said State of North Carolina, and in and between said State and the other States aforesaid, and other States of the United States, and in and between other States and Territories of the United States, and also is, and since its said organization has been, engaged in said State and the other States aforesaid in foreign commerce.

5. That at its session held in the year 1907, and just ended, the General Assembly of North Carolina passed an act entitled "An Act to prevent unjust discrimination in freight rates and to fix maximum charges therefor." The said act was ratified on the ninth day of March, 1907, and is hereinafter referred to as the "Act in respect to Freight Rates." The said act is as follows:

127 An Act to prevent unjust discrimination in freight rates and to fix the maximum charges therefor.

The General Assembly of North Carolina do enact:

SECTION 1. That the Corporation Commission, created by the laws of North Carolina, shall not, in fixing the maximum rates and charges, or tariff or rates or charges for any common carrier transporting freight in North Carolina, permit or allow any such common carrier to charge, collect or receive a greater toll, charge or rate for the transportation of any article of freight or commodity embraced in the present classification fixed and prescribed, or approved by said Corporation Commission where the initial point of shipment is on the road or line of one common carrier in this state and the terminal point of said shipment is on the line or road of another common carrier in this state, than is the sum of the present local rates now established, prescribed or approved by said Corporation Commission, less a reduction of twenty-five per centum of the said local rates on all railroads for which there is now made or prescribed a reduction for a joint haul; and on those railroads for which there is not now prescribed a reduction on joint hauls a reduction of fifteen per centum of the local rates now established, prescribed or approved by said Corporation Commission for said railroads; Provided that those railroads of this class whose rates are lower than the Corporation Commission's standard of freight rates may be permitted by said commission to adopt the standard rates prescribed by said commission; Provided that the Corporation Commission is hereby empowered to reduce the said local rates whenever in its opinion and after investigation by it it shall determine that a lower rate is reasonable: Provided, further, That present local rates now

established, prescribed or approved by said Corporation Commission shall not be increased by classification or otherwise.

SECTION 2. That any railroad company doing business in the State of North Carolina, or officer or agent thereof, who shall give to any person or shipper any advantage over another person or shipper under like circumstances by way of any rebate or reduced rate not authorized by law, or by the North Carolina Corporation Commission, or which shall make charges for shipments of freight in violation of the provisions of this act, or shall wilfully discriminate in the matter of service in favor of one person or corporation against another under like circumstances, shall be guilty of a misdemeanor, and such corporation shall, upon conviction, be fined not less than one hundred dollars, and such officer or agent shall be fined or imprisoned or both, in the discretion of the court; and any shipper or consignee of any freight in the State of North Carolina who shall knowingly accept any rebate or other consideration or service
128 from any railroad company which is not allowed or given other shippers or consignees under like or similar circumstances, and which is not allowed by law, shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court.

SECTION 3. That whenever any person, firm or corporation intending to ship freight makes a written application to any railroad company for a car or cars to be loaded in carload lots with any kind of freight embraced in the tariffs of said company, stating in said application the character of the freight, the number of cars wanted, the station, depot siding, wharf or boat landing on the road or line of said railroad company whence the shipment is to be moved, and its final destination, the railroad company shall furnish the said car or cars within four days from seven o'clock a. m. the day following such application, which said application shall be delivered to the agent of the railroad company at the station at or nearest the point of shipment. Any railroad company failing to furnish the car or cars named in said written application shall be subject to a penalty of five dollars per car per day for each car not furnished, to be recovered by the person, firm or corporation making said application: Provided that the said railroad company before furnishing the car or cars upon said application of the shipper may require the person, firm or corporation applying for the same to deposit five dollars for each car so demanded at the time the application is made, which said deposit of five dollars for each car may be retained by the said railroad company as a forfeit for trackage, in case the car or cars are not loaded within forty-eight hours after notice of the placing of said car or cars in accordance with said demand: Provided that the Corporation Commission may excuse from the penalties imposed by this section independent lines not owned, operated or controlled by any other line or system when trackage is less than one hundred miles.

SECTION 4. That section two thousand six hundred and thirty-two of the Revisal of one thousand nine hundred and five of North Carolina be, and the same is hereby amended as follows: By striking out the words "twenty-five" in line eleven of said act and inserting

in lieu thereof the word "fifteen," and by striking out the word "five," the last word in said line, and inserting in lieu thereof the word "two," and by further striking out the words "twelve and fifty one-hundredth-" in lines fourteen and fifteen thereof and inserting in lieu thereof the word "ten," and by further striking out the words "two and fifty one-hundredths" in line fifteen and inserting in lieu thereof the word "one."

That this section four shall not apply to existing causes of action.

SECTION 5. The Corporation Commission is hereby directed to prepare and publish the tariff of rates, charges and tolls to be charged and collected by railroad companies in this State, as au-
129 thorized by this act, on or before July the first, one thousand nine hundred and seven.

SECTION 6. This act shall be in force from and after July the first, one thousand nine hundred and seven.

In the General Assembly read three times and ratified this the 9th day of March, 1907.

That the General Assembly of North Carolina, at its said session, also passed an act entitled "An Act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina," which was ratified on the 2d day of March in the year 1907, and is hereinafter referred to as the "Act in respect to Passenger Rates." Said act is as follows:

An act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina.

The General Assembly of North Carolina do enact:

SECTION 1. That no railroad company doing business as a common carrier of passengers in the State of North Carolina, except as hereinafter provided, shall charge, demand or receive for transporting any passenger, and his or her baggage not exceeding in weight two hundred pounds, from any station on its railroad in North Carolina to any other station on its said road in North Carolina, a rate in excess of two and one-quarter cents per mile, and for transporting children twelve years of age or under, one-half of the rate above described: Provided that the Corporation Commission of North Carolina is hereby authorized and empowered to permit all independently owned and operated railroad companies in North Carolina, whose mileage of road in said State is sixty miles or under, to charge a rate for transporting passengers not in excess of the present rate fixed and prescribed for said road; and also to permit all railroads constructed within the twelve months preceding the first day of January, nineteen hundred and seven, or at that time in course of construction, for a term of two years from and after July 1st, 1907, and also such railroads as may be constructed within two years from January 1, 1907, to charge such rate in excess of the rate above prescribed as the said Commission may determine to be reasonable. A charge of ten cents may be added to the fare of any passenger when the same is paid upon the cars, if a ticket might have been procured

within a reasonable time before the departure of the train; and no railroad company shall be required to accept a single fare for less than five cents.

SECTION 2. In the case that any railroad company operating as a common carrier of passengers in the State of North Carolina is owned, controlled or operated by lease or other agreement by any other railroad company doing business in this State the rate for carrying passengers thereon as prescribed in this act shall be determined for said railroad by the rate prescribed by this act for the railroad company which owns, controls or operates the same; and the North Carolina Corporation Commission shall publish the rates fixed by this act for the several railroad companies operating in this State, on or before the first of June, 1907.

SECTION 3. That mileage books of one thousand miles in each book shall be kept on sale at such railroad ticket offices in North Carolina as shall be named and designated by the Corporation Commission of North Carolina, and when such mileage book is purchased it shall be good in the hands of any person or persons named therein on all railroads on which the fare is the same as or less than the fare on the road of the company selling such mileage book; and when the mileage is detached from said book by any other railroad company than the one which sold it, the said mileage shall be redeemable on demand by the railroad company which sold it.

SECTION 4. That any railroad company violating any provision of this act shall be liable to a penalty of five hundred dollars for each violation, payable to the person aggrieved by such violation, and recoverable in an action to be instituted in the name of said person in any court of this State having competent jurisdiction thereof. And any agent, servant, or employé of any railroad company violating this act shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the Court.

SECTION 5. That any person or persons, except those permitted by law, who accept free transportation shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the Court.

SECTION 6. That section 2618 of the Revisal of 1905 is hereby repealed, and all laws and clauses of laws in conflict with this act are hereby repealed.

SECTION 7. That this act shall be in force from and after July 1st, 1907.

6. At its session held in the year 1899 the General Assembly of North Carolina passed an act entitled "An Act to establish the North Carolina Corporation Commission." Said act has been since amended and as amended provides for the election of three commissioners who shall be known as the North Carolina Corporation Commission, and that each of said commissioners shall take an oath to support the constitution and laws of the state of North Carolina and to well and faithfully execute the duties of his office as a member

of the North Carolina Corporation Commission. Said act, as
131 so amended, further provides that said commissioners shall have such general control and supervision of all railroad companies or corporations engaged in the carrying of freight or passengers necessary to carry into effect the provisions of said act and shall have full power to obtain the information necessary for carrying into effect, and otherwise enforcing, the provisions of said act. Said act, as so amended, further provides that if any railroad doing business in the state of North Carolina, or if any such company organized under the laws of any other state and doing business in the state of North Carolina shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, such railroad or company shall be deemed guilty of extortion and upon conviction thereof shall be fined not less than five hundred dollars nor more than five thousand dollars. Said act, as so amended, further provides that any railroad or corporation which violates any of the provisions of said act, or refuses to conform to, or obey, any rule, order or regulation of said commission shall in addition to the other penalties prescribed in said act forfeit and pay the sum of five hundred dollars for each offense to be recovered in an action to be instituted in the Superior Court of Wake county in the name of the state of North Carolina on the relation of the North Carolina corporation commission, and that each day such company, or corporation, continues to violate any provision of said act or continues to refuse to obey or perform any rule, order or regulation prescribed by said North Carolina Corporation Commission shall be a separate offense. Said act, as so amended, further provides that said corporation commission whenever in its judgment any corporation has violated or neglected in any respect to comply with the provisions of any law of the state, shall give notice thereof in writing to such corporations, and, if the violation or neglect is continued after such notice, shall forthwith present the facts to the attorney general who shall take such proceedings thereon as he may deem expedient. By the laws of North Carolina the Assistant Attorney General is invested with the same powers, and is required to perform the same duties, as the Attorney General, among them being the powers and duties just mentioned as appertaining to the Attorney General.

7. That the above mentioned defendants, Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, constitute the Corporation Commission of the State of North Carolina, the said Franklin McNeill being Chairman, and the said Samuel L. Rogers and Eugene C. Beddingfield being associate members, thereof, and that
132 the defendant Robert D. Gilmer is the Attorney General of the State of North Carolina and the defendant Hayden Clement is the Assistant Attorney General of said State; and all of said defendants have their offices in the city of Raleigh in the State of North Carolina, and the defendants Franklin McNeill, Eugene C. Beddingfield and Robert D. Gilmer are inhabitants of, and reside in, the Eastern District of North Carolina.

8. That the effect of said "Act in respect to Freight Rates" and of

the said "Act in respect to Passenger Rates," whether taken separately or together, if enforced, would, as will appear from the considerations now about to be set forth, be to deprive the complainant of its property without just compensation, and without due process of law, and to deny to it the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, the benefit and protection of which the complainant respectfully sets up and claims.

The existing rates and charges in effect upon this complainant's lines in the State of North Carolina, and applicable to intrastate business in said State, are not higher than is just and reasonable, whether considered in respect to the value of the property used in the public intrastate service in said State, or in respect to the value of the service rendered to the shippers or to the travelers upon its lines. These rates and charges now in use on complainant's lines in North Carolina are, in respect to the traffic covered by the said "Act in respect to Freight Rates," the sum of the present local rates, now established, prescribed or approved by the said Corporation Commission, less a reduction of fifteen per cent. of the said local rates, and, in respect to passenger traffic covered by the said "Act in respect to Passenger Rates" are the rates and charges now established, prescribed and approved by the said Corporation Commission, namely, three and one fourth cents per mile for first class fare, and two and three fourths cents per mile for second class fare.

The complainant further shows that the effect of the said "Act in respect to Freight Rates," and of the said "Act in respect to Passenger Rates," now proposed to be put into effect, upon the business of this complainant between points both of which are in the State of North Carolina, and which does not pass out of said State en route, for the year ending June 30, 1906, is as follows:

133 The maximum actual net earnings from North Carolina intrastate business for said year, after deducting the proper proportion of improvements and betterments not capitalized, and the proper proportion of taxes, were	$324,754.64
Whereas under the proposed rates and charges in North Carolina, such maximum net earnings on the business of the same year would have been.....	28,007.47
Showing a reduction of such actual net earnings from North Carolina intrastate business for said year under the proposed rates and charges of at least....	$296,747.17

The foregoing maximum actual net earnings are arrived at as follows:

The maximum earnings from intrastate traffic in North Carolina, after paying the cost of operation for said year amounted to		$453,811.41
The ratio of the intrastate gross traffic revenue in North Carolina for said year to the entire gross traffic revenue of the North Carolina lines of this complainant covering both inter and intra state traffic in North Carolina for said year, is	27.60%	
27.60% of the gross taxes ($269,651.18) paid in North Carolina by complainant in said year, is	$74,423.73	
27.60% of the improvements and betterments, not capitalized, chargeable to complainant's North Carolina properties during said year ($197,945.81), is	54,633.04	
Total taxes and improvements and betterments so chargeable against intrastate traffic		$129,056.77
Leaving maximum net intrastate earnings as above mentioned, after deducting the said proportion of taxes, improvements and betterments		$324,754.64

The complainant further shows that the effect of the establishment of the proposed rates and charges would not be limited to the intra-state business in North Carolina of this complainant but would inevitably affect the interstate business of this complainant
134 and impair and diminish the revenue derived therefrom. This inevitably follows from the fact that many of its interstate rates on freight, and all, or nearly all, of its interstate rates for passengers, are made, and necessarily made, on a combination of locals, or by the use of locals as factors, and, where the local rate within the State of North Carolina is reduced, the inevitable effect upon the revenues of this complainant from its interstate business would be a reduction, and accordingly the total loss which this complainant would have to incur, in the event that the proposed rates and charges are made effective, would not be represented simply by the figures above given but a very considerable and appreciable loss would necessarily be added thereto, growing out of the reductions on its interstate business, as aforesaid.

In addition to this, the General Assembly of North Carolina, at its session of 1907, passed and enacted various other public statutes, the direct, immediate, and necessary effect of which will be to greatly increase the cost of the complainant's operations in that State, the titles of which said acts are as follows, namely:

"An Act to provide for the assessment of real estate of railroad companies in stock law territory for local benefit," ratified on the eighth day of March, 1907.

The effect of this act will be to impose a new and additional tax upon complainant's properties in North Carolina.

"An Act to prescribe the hours of service of employees of railroad

companies engaged in the operation of trains," ratified on the eighth day of March, 1907.

The effect of this act will be to largely increase the cost of labor in complainant's intrastate operations in North Carolina.

"An Act to authorize the Corporation Commission to require railroads to erect and maintain union depots in towns of two thousand inhabitants," ratified on the eleventh day of March, 1907.

The effect of this act will be to impose large pecuniary burdens on the complainant in North Carolina.

"An Act to extend and enlarge the powers of the Corporation Commission," ratified on the eleventh day of March, 1907.

True copies of said acts are herewith filed as a part of this bill, marked Exhibits Nos. 2, 3, 4, and 5, respectively.

The complainant further shows that there is, in respect to this complainant's property, as in respect to all other classes of property in the State of North Carolina, whether owned by individuals or corporations, a difference between the commercial and the tax assessment value, the commercial value being, in respect to all classes of property, greater than the value assessed for purposes of taxation,
135 and, while this complainant does not admit, and, in fact, expressly denies, that the tax value assessment is as great as the value which ought to be considered for the purpose of determining its right to make reasonable earnings out of, and reasonable returns on, the property used by it in doing its business as a common carrier, and performing the public service required of it, as such, the complainant is advised that the State of North Carolina, having made the assessment for the purpose of taxation upon the complainant's property in said State, cannot deny that its property in that State is worth at least the amount of said assessment, and, in fact, its property in North Carolina is worth more than the amount of said assessment and it would cost more to reproduce it. If, however, the earnings which it can make under the proposed rates and charges are estimated only in reference to the said assessed value of its said property made by the State of North Carolina for the purposes of taxation, the complainant avers that the proposed rates and charges will not permit it to earn reasonable profits, and enjoy reasonable returns, even upon that valuation, and such rates and charges will deprive it of the legitimate use of its property.

The ad valorem assessment upon the properties of the complainant in North Carolina during the year ending June 30, 1906, made by the State of North Carolina was.....	$26,134,865.00
Taking the proportion of this valuation which is used for the purpose of producing revenue from intrastate traffic in North Carolina, in the ratio which the gross intrastate traffic revenue in North Carolina bears to the total gross traffic revenue in the State of North Carolina, which is the proper proportion for such purpose, and is 27.60 per cent., the value of the property used in North Carolina for intrastate purposes, on the basis of North Carolina's assessment for purposes of taxation, is shown to be.....	7,213,222.74

Even upon this valuation, the net earnings permitted to this complainant under the proposed rates and charges from its intrastate business in the State of North Carolina would, for the year ending June 30, 1906, only amount to thirty-nine one-hundredths of one per cent. on the said tax value, before allowing anything for payment of interest on its bonds or dividends on its stock. Such returns are not as much as a reasonable profit upon the invested capital, or upon the actual value of the property used.

136 The complainant further shows that the total bonded indebtedness of this complainant applicable to its North Carolina property on the basis of setting out to North Carolina all of such indebtedness that is specially a lien upon North Carolina properties, and a lien upon no other properties, and taking the North Carolina mileage proportion of the general bonded indebtedness of the complainant, is..... $24,623,078.29

On which the annual interest charge which complainant is obliged to pay is..... 714,103.08

And that the annual trackage and rentals paid for lines in North Carolina by the complainant amount to..... 481,189.99

The net income from intrastate traffic in North Carolina should contribute its *pro rata* proportion to the payment of such interest and rental charges, namely, at least 27.60 per cent., or the sum of..... 329,900.89

But the total net earnings from intrastate traffic in the State of North Carolina under the proposed rates and charges would amount to only the sum of..... 28,007.47

Which would leave a deficiency, after paying the amount properly apportionable to intrastate traffic in the State of North Carolina of such interest and rentals of..... 301,893.42

and no returns whatever to the owners of said property.

Complainant says that the figures given in this bill in respect to the result on its revenues for the year ending June 30, 1906, are in their net result fairly representative of past and future conditions, except that the operating expenses of the complainant have since June 30, 1906, increased relatively far more than gross earnings and that the net result will be even more unfavorable and yield a still smaller return to the complainant than is here shown for the year ending June 30, 1906.

The general commercial conditions in North Carolina are prosperous, the transportation service rendered by the complainant in intrastate transportation is large, and at reasonable rates the returns therefor to this complainant would be much greater.

The complainant further shows that there will be no compensa-

tory increase in the business or tonnage of this complainant resulting from the proposed reduced rates, and that there will be no appreciable or substantial increase whatever in such business or tonnage, due to such reduced rates.

137 The lines of railway of this complainant have at all times been operated as economically as practicable, under the existing conditions, and its operating expenses have at all times, under the conditions confronting it, been as reasonably low in amount as they could be made by economical and judicious management, and it has not been possible, under the conditions existing, for the complainant to operate its road for less than it has been operated. In all respects it has confined its operating expenses, its taxes, its interest, and every other expenditure, within the lowest and narrowest limit reasonably practicable under existing conditions. The complainant, therefore, respectfully shows to this Honorable Court that the result of the said rates and charges would be to deprive this complainant of its property without just compensation, to deprive it of the equal protection of the laws, and to take its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, the benefit and protection of which it expressly sets up and claims.

9. Under the laws of the State of North Carolina, the Corporation Commission of that State is required to make reasonable and just rates of freight and passenger charges over the lines of railroad in that State, including the lines of the complainant, and, in pursuance of said duty, the said Commission did, prior to March 2, 1907, fix and establish rates of freight and passenger charges for this complainant which in the opinion of said Commission were reasonable and just, the rates so fixed by said Commission being, in respect to the freight traffic covered by said "Act in respect to Freight Rates," the sum of the locals less fifteen per cent., and being, in respect to the passenger travel covered by said "Act in respect to Passenger Rates" three and one-fourth cents per mile for first class, and two and three-fourth cents per mile for second class, and the rates so fixed by said Commission were in force, and were deemed by said Commission to be just and reasonable, at the time of the passage of said "Act in respect to Freight Rates," and said "Act in respect to Passenger Rates." The complainant shows that since said rates were so fixed by the Commission the cost of performing the service by the complainant has largely increased, and in consequence thereof said rates should, in order to be now just and reasonable, be increased instead of being decreased.

10. The complainant further shows that its present rates in North Carolina are not higher than a reasonable compensation for the service rendered by it to the shippers and to travelers on its lines,

138 and are in no sense excessive or extortionate; that they are not unjustly, unduly, unreasonably or illegally discriminatory as between individuals, nor as between localities, nor as between different kinds of traffic, and that they in no way violate any law. The complainant is advised that it has, as an incident of its property and as a property right, the right to charge for each service which

it renders a reasonable compensation, and that this complainant is protected by the Fourteenth Amendment to the Constitution of the United States in making, receiving and collecting such charge. The effect of the proposed rates and charges would be to materially diminish this complainant's charges, and to reduce them greatly below what would be a reasonable compensation for the respective services rendered to the shippers and the travelers on its lines. The complainant is advised that to prevent it from charging a reasonable compensation for the service rendered the shipper or the traveler would be to deprive it of its property without just compensation, and without due process of law, and would be to deny to it the equal protection of the laws; and this complainant again claims, in this regard, the benefit and protection of the Fourteenth Amendment to the Constitution of the United States, and shows that if the proposed rates and charges are put into effect the result would be, as aforesaid, to deprive it of its property contrary to the said Fourteenth Amendment to the Constitution of the United States.

11. This complainant is further advised that it has, as an incident of its property and as a property right, the right to increase its charges whenever, under the circumstances then existing, its charges are less than a reasonable compensation for the service which it renders, and that what may be a reasonable charge today for a service may become an unreasonably low charge tomorrow, or at any time thereafter, if conditions in respect to the expense of the service, or other conditions, are so changed as to make it so. The complainant is therefore advised that any action by a State which attempts to fix a maximum charge beyond which the complainant cannot go, no matter how unreasonably low such maximum may become under changed conditions, would be to deprive the complainant of its property right to increase its rate up to what would, under such changed conditions, be a reasonable compensation for the service rendered, and would therefore, violate the Fourteenth Amendment to the Constitution of the United States. This complainant avers that the said "Act in respect to Freight Rates," and the said "Act in respect to Passenger Rates," both undertake to fix a maximum beyond which this complainant cannot go, no
139 matter what may be the circumstances, and that, therefore, said acts are unconstitutional and void, as being in violation of the Fourteenth Amendment to the Constitution of the United States. This complainant further shows that many of its existing rates are lower than is just compensation for the service rendered, and have heretofore yielded, and will continue to yield to the complainant much less than a reasonable return upon the value of its property employed in such service. Since they were fixed, the operating expenses of the complainant have, without its fault, been largely increased, the cost of equipment, of materials and supplies and of labor, necessary for its operation, having all largely increased, so that the net return to this complainant has become much less than it has heretofore been, and it is not now, and never has been, as much as this complainant is entitled to receive. All of said maximum rates fixed by the said acts of the General Assembly of North

Carolina, both those in regard to freight, and those in regard to passengers, are lower than a just compensation for the service rendered, and are lower than would afford this complainant a reasonable and just return upon the value of its property used in performing the services in return for such rates, and that the effect of said acts, because thereof and also because said acts undertake to impose an immovable maximum, is to deprive this complainant of its property without due process of law and of the equal protection of the laws, and to take its property without just compensation, contrary to the said Fourteenth Amendment to the Constitution of the United States, the benefit and protection of which is again in this regard expressly set up and claimed.

12. This complainant further shows that its existing rate fabric is properly adjusted in its relation between its interstate rates and its State rates in North Carolina and in other States, and that all its charges, with perhaps trifling and negligible exceptions;—exceptions which, if they exist, are entirely unimportant in the present connection—are just and reasonable in themselves, and do not and will not give to this complainant more than a just and reasonable return upon the value of its property used in the transportation service which it renders to the public; and that any reduction in its revenues will seriously embarrass and obstruct it in providing, and will deprive it of its power to properly provide, the facilities which the public commerce dependent upon it for transportation absolutely requires for the movement of traffic, both intra and interstate. This complainant is advised that no State has a right to require that its own commerce between points within the State shall be given a preferential service, or shall be carried at preferential and lower rates than other commerce. No State
140 has a right to require such discrimination or partiality in favor of its own traffic. This complainant shows that the effect of the said rates proposed to be put into effect, pursuant to the acts of the General Assembly of North Carolina hereinbefore referred to, will be to destroy the proper adjustment of its intrastate rates in North Carolina to its interstate rates generally, and to its intrastate rates in other States, and to require that a preference shall be given by this complainant, and an undue discrimination exercised by it, in favor of the intrastate traffic in North Carolina over the interstate traffic carried by this complainant, and over the intrastate traffic of this complainant in other States, and that to require such preference and such undue discrimination in regard to the intrastate traffic of the State of North Carolina would be to so regulate and burden interstate commerce as to violate the Commerce Clause of the Constitution of the United States, the benefit and protection of which this complainant respectfully sets up and claims.

13. That by section 3 of the above mentioned "Act in respect to Freight Rates" it is provided that whenever any person, firm or corporation intending to ship freight makes a written application to any railroad company for a car or cars to be loaded in car load lots with any kind of freight embraced in the tariffs of said Company, stating in such application the character of the freight, the number

of cars wanted, the station, depot, siding, wharf or boat landing on the road or line of said railroad company whence the shipment is to be moved, and its final destination, the railroad company shall furnish said car or cars within four days from seven o'clock A. M. of the day following such application; which said application shall be delivered to the agent of the railroad company at the station at or nearest the point of shipment; and it is further provided that any railroad company failing to furnish the car or cars named in said written application shall be subject to a penalty of five dollars per car per day, for each car not furnished, to be recovered by the person, firm or corporation making said application; but the Corporation Commission may excuse from the penalties imposed by this section independent lines not owned, operated, or controlled by any other line or system, where trackage is less than one hundred miles. The requirements of said statute are peremptory, and no exception is made in cases of inability of the carrier occasioned by wrecks or other accidents upon its road involving a detention of traffic, the breaking of bridges, accidental fires, washouts or other unavoidable consequences of heavy weather,

and no exception in cases of a sudden congestion of traffic
141 and actual inability to furnish cars by reason of their temporary and unavoidable detention in other States, or in other places within the same State, or in favor of the necessities of other classes of traffic, inter or intra state. The complainant is advised that the said provision of the said act in respect to freight rates, is, therefore, a regulation of interstate commerce, and violates the commerce clause of the Constitution of the United States, the benefit and protection of which, in this regard, is here again expressly set up and claimed.

14. That by the said "Act in respect to Freight Rates" it is provided that any railroad company doing business in the State of North Carolina, or officer or agent thereof, who shall make charges for shipments of freight in violation of the provisions of said act, shall be deemed guilty of a misdemeanor, and such corporation shall, upon conviction, be fined not less than one hundred dollars, and such officer or agent shall be fined or imprisoned, or both, in the discretion of the court. And by the said "Act in respect to Passenger rates" it is provided that any railroad company violating any provision of the act shall be liable to a penalty of five hundred dollars for each violation, payable to the person aggrieved by such violation, and recoverable in an action to be instituted in the name of said person in any court of North Carolina having competent jurisdiction thereof, and any agent, servant or employee of any railroad company violating said act, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. This complainant is advised that the effect of said act is, in addition to the punishment of the officer, servant, agent or employee for a misdemeanor, to impose upon this complainant for each shipment of freight, at a greater rate than is allowed by the said act in respect thereto, a fine of one hundred dollars, and for each sale of a passenger ticket, at a rate

greater than is allowed by the said act in respect to passengers, a fine of five hundred dollars. An effort is thus made to prevent by these enormous penalties, which are in their nature confiscatory of this complainant's property, any inquiry into the validity of these particular statutes, and to so burden any challenge thereof in the courts that this complainant and the others affected thereby must necessarily submit, rather than take the chances of the penalties imposed, and this complainant is advised that the effect of these penalties and of the legislation which imposes them is, because no other person or business in North Carolina is subjected to such penalties under similar circumstances, to deprive this com-
142 plainant of the equal protection of the laws, and, moreover, is a denial to this complainant of due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which this complainant respectfully sets up and claims.

15. That by said section 3 of "said act in respect to passenger rates" it is provided that mileage books of one thousand miles in each book shall be kept on sale at such railroad ticket offices in North Carolina as shall be named and designated by the Corporation Commission of North Carolina, and when any such mileage book is purchased it shall be good in the hands of any person or persons named therein on all railroads on which the fare is the same as, or less than, the fare on the road of the company selling such mileage book; and, when the mileage is detached from said book by any other railroad company than the one which sold it, the said mileage shall be redeemable on demand by the railroad company which sold it. This complainant is advised that the effect of said provision is to require this complainant to accept and to carry out, the contracts of other railroad companies as embraced in said mileage book tickets and to permit some other railroad company to collect money for the price of transportation which this complainant by said law will be required to furnish, and is, moreover, to constitute this complainant, without its consent, the agent of other railroad companies for the purpose of sale of tickets and the receipt and accounting for the price thereof. This complainant is further advised that while it may be the proper interpretation of said provision, that it may limit in point of time the mileage tickets which it issues, there is no power given to this complainant to limit, in point of time, the mileage books issued by other carriers which, by the terms of said act, it is required to redeem without reference to the length of time the same might be outstanding. This complainant is advised, and here shows to the court, that the said provisions of section 3 mentioned in this paragraph are unreasonable regulations, as applied to this complainant and its business, and deprives it of its property right of management of its own property and, by seeking to impose upon it unreasonable burdens, deprives it of the proper use of its property without due process of law and also deprives it of the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, the benefits and protection of which this complainant respectfully sets up and claims.

16. This complainant further shows that there is no just reason for making a rule for some of the railroads different from that made for the Complainant, in respect to their freight rates, and in respect to demurrage charges, and that there is no reasonable
143 basis for such difference; and there is likewise no just reason for the difference in rates in the said "Act in respect to Passenger Rates" made in favor of roads in said State whose mileage is sixty miles or under over other railroads, and in favor of railroads constructed within twelve months preceding the first day of January, 1907, or at that time in course of construction, and such railroads as may be constructed within two years from January 1st, 1907, over other railroads. Each of the carriers in said State of North Carolina is, under the Constitution of the United States, entitled to charge a reasonable compensation for the service rendered, and no difference in classification can be made arbitrarily by length of road merely for the purpose of allowing one carrier to charge more than another for the same or similar service. This complainant is, therefore, advised that the effect of said acts in making such difference in classification and in permitting one carrier to charge for the same service in North Carolina a greater sum than is permitted to another carrier in North Carolina is to deprive this complainant of the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, which this complainant, in this regard, here again respectfully sets up and claims.

17. The complainant further shows that the Corporation Commission of North Carolina is required by the said "Act in respect to Freight Rates" to prepare and publish, before the same go into effect, the tariff of rates, charges and tolls to be charged and collected by railroad companies in the State of North Carolina, as authorized by said act, and by the said "Act in respect to Passenger Rates" it is required to publish, before the same go into effect, the rates fixed by the said act for the several railroad companies operating in the State of North Carolina, and the Corporation Commission of North Carolina is further required by the law of North Carolina, if this complainant, in its opinion, violates the said "Act in respect to Freight Rates," or the said "Act in respect to Passenger Rates," and charges a rate in excess of the amount permitted by such acts respectively, to give notice in writing to this complainant of such violation, and, if such charge in excess of the rates fixed by said acts is continued after such notice, said commission is required to present the facts forthwith to the Attorney General, and the said Attorney General and the said Assistant Attorney General are required to take such proceedings thereon as they may deem expedient; and this complainant says that, unless prevented by the injunction of this Honorable Court, the said Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, constituting the Corporation Commission of the State of North Caro-
144 lina, will, for the purpose of putting the same into effect, make up and publish said tariff of freight rates

as provided by said "Act in respect to Freight Rates," and will undertake to classify your complainant and the other carriers in North Carolina in accordance with, and will publish the passenger rates prescribed by, said "Act in respect to Passenger Rates," and will, in case this complainant exercises its constitutional right to make charges in excess of the rates fixed by said acts respectively, proceed against this complainant for a violation thereof, and the said Robert D. Gilmer, Attorney General, and the said Hayden Clement, Assistant Attorney General, will, in such case, proceed to impose the penalties prescribed by said act on this complainant therefor.

The complainant further shows that, unless this Court takes jurisdiction of and determines the question of the constitutionality and validity of said statutes and affords complainant relief in respect thereto in this cause, the number of actions for penalties to which it will be thus exposed and which will be thus instituted against it, will be enormous, and it will be very difficult, if not practically impossible, to show in defence of each of said actions and prosecutions, what the effect upon the Complainant's revenues would be of the proposed reductions in its freight and passenger rates or such effect in respect to each particular article of freight and each particular passenger; and in any event, it would be seriously and unjustly burdensome and expensive to the complainant to be subjected to the great multiplicity of suits and prosecutions for penalties to which it would be subjected if relief herein is not granted, and to be obliged to produce in each and all of said suits and prosecutions the necessary evidence to show that said freight tariff and said passenger tariff are unreasonable and unjust and are confiscatory of your complainant's property; and the pendency of such suits, involving in the aggregate such enormous amounts of penalties would depreciate the value of complainant's property and the value of its stocks and bonds and would greatly impair its credit and consequently its ability to perform the public service required by the commerce tributary to its lines, and would inflict great and irremediable injury and damage, not only upon the complainant and upon the holders of its stocks and bonds, but also upon the shipping and travelling public. The complainant avers that in all the multitude of actions and prosecutions referred to the same question would be involved, and that that question is involved, and can be tried and its merits fairly determined in this cause.

145 18. The subject matter of this suit now brought before this Honorable Court is a controversy between citizens of different States, and the amount involved herein, exclusive of interest and costs, exceeds the sum or value of $2,000, and this suit also involves questions arising under the Constitution of the United States, and rights asserted by the Complainant under said Constitution and protected thereby.

19. The complainant shows to the court that its purpose in this cause is, by an orderly proceeding in the courts, to obtain a judicial determination of its rights under the Constitution of the United States, and, if, as it is advised and believes, its just rights in the

premises are imperilled, denied and encroached upon by the several acts of the General Assembly of North Carolina hereinbefore complained of as contrary to the Constitution of the United States, then to obtain a judicial decree establishing and protecting the rights of this complainant, and to that end it is essential, as alleged in this bill, that an injunction shall be issued; but this complainant does not desire in any way injuriously to affect any lawful right of the State or of the people of North Carolina, or of any other person, and hereby complainant offers and undertakes to do all in its power to maintain the *status quo* during the course of this judicial inquiry, and accordingly it consents, and it prays the court, that there may be and shall be adopted herein a proceeding analogous to that provided by section 7 of the Corporation Commission Act of North Carolina, namely, the execution of a bond by the complainant conditioned to pay into the registry of this court, from time to time, when and as the court may so order, such sum or sums of money as shall be equal to the difference between the aggregate freight and passenger rates charged and received by it, and those fixed in or under the said acts of Assembly, and that, as an incident thereto, the complainant shall give to any person purchasing a ticket for travel on its lines in the State of North Carolina a transferable coupon, or other written evidence, representing the sum to which such person, or his transferee, will be entitled upon a final decision upholding the constitutionality of such laws, such coupons, or the amount covered by such other written evidence, in that event to be payable out of the cash deposit in the registry of this court; and that this complainant, from time to time, shall report to the court at intervals to be fixed by the order of the court herein, statements showing the amount of such passenger fares and of the freights by it charged and collected, and of the names of the shippers of such freights, and that from time to time the complainant shall give such further bond or bonds as the court may require to secure the
146 proper payment into court of all amounts which finally it shall be adjudged that it should repay, or reimburse, under the final decision of this court, or upon final review thereof; and that on a final determination herein that this complainant is entitled to the amounts covered by said bond or bonds, that the said bonds be released and canceled by the court, and, if any amounts shall have been paid into the registry of the court pursuant thereto that, upon such determination in favor of the complainant, the sum or sums so paid into the registry shall be repaid to the complainant without further order of the court herein.

20. Complainant avers that it will be irremediably injured unless an injunction be granted as hereinafter prayed, and relief be given to it in this suit.

In consideration whereof, and forasmuch as your complainant is remediless in the premises under the rules of the common law and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable, and to the end, therefore, that the defendants hereinafter named may answer the several matters and things hereinbefore set forth as fully and par-

ticularly as if the same were again here repeated, and they were thereunto specially interrogated, but not under oath, answer under oath being expressly waived, the complainant prays that the said defendants be required so to answer, and that an injunction may be issued out of this court enjoining and prohibiting the defendants Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, constituting the Corporation Commission of North Carolina, and each of them individually, and jointly as constituting the said Corporation Commission of North Carolina, and each and all of their successors in office, from preparing and publishing the tariff of rates, charges and tolls mentioned in said act in respect to freight rates, and from classifying the railroads operating in North Carolina in accordance with, and from publishing the rates fixed by said act in respect to passenger rates, and from taking any steps, under or in pursuance of the said act of the General Assembly of North Carolina entitled "An Act to prevent unjust discrimination in Freight Rates and to fix maximum charges therefor," ratified March 9, 1907, or under said act of the General Assembly of North Carolina entitled "An Act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina," ratified March 2, 1907, and from taking any step
147 in pursuance of any of the laws of the State of North Carolina, either directly or through the said defendant Robert D. Gilmer, Attorney General, or Hayden Clement, Assistant Attorney General, or by or through any other attorney at law, or otherwise, to enforce either of said Acts or the penalties therein prescribed, or any other penalties against the complainant, or against any of its officers, agents, or employees, for failure to put into effect or to observe on any of the lines of complainant in North Carolina the said freight rates or the said passenger rates required by either of said Acts, and enjoining the defendants Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, each and every of them, and their and each of their successors in office, from taking any step under the laws of North Carolina, by themselves or through any other attorney at law, or otherwise, for the purpose of enforcing either of said Acts or any of the penalties thereby prescribed, or any other penalties against the complainant or against any of its officers, agents or employees, for failure to put into effect, or to comply with either of the said Acts of the General Assembly of North Carolina or any of the provisions thereof, and enjoining each and all of said defendants, their servants or agents, from instituting or bringing, or causing to be instituted or brought, as aforesaid, any suit, either at law or in equity, against your complainant, or against any officer, agent or employee of your complainant, compelling your complainant, or any of its officers, agents or employees to put into effect, or observe, either of said Acts, or any provision thereof, and enjoining and prohibiting the said Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, and each of them, and their successors in office, and each and every other attorney at law that may be employed or appointed by the said Corporation

Commission of North Carolina, or by the said Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, Railroad Commissioners, or either of them, or by any other officer of the State of North Carolina, from bringing or prosecuting any action or proceeding, civilly or criminally, against your complainant, or any of its officers, agents or employees, for penalties or fines or damages, or for any cause of action whatsoever, for failure to put into effect on any of the said lines of railway of the complainant in North Carolina any of said tariffs, passenger or freight, or for failure to observe said Acts or either of them, or any provision of either, and from instituting or bringing, or causing to be instituted or brought, any suit at law or in equity, for penalties or otherwise, against the complainant or any officer or agent of the complainant, for charging more for freight or passenger transportation than is provided by said Acts, or so as in any way to prevent or hinder the complainant
148 from increasing its freight and passenger charges, to the extent that such increase may be fair, reasonable and just, and prohibiting all other individuals, persons or corporations from instituting or prosecuting any suit or suits against the complainant, or against any officer, agent or employee of the complainant, for the recovery of any damages or overcharges, or for the recovery or imposition of any penalty or penalties, under or by virtue of said Acts or either of them, or under or by virtue of any other law of North Carolina, because of or growing out of the failure of the complainant or any of its officers, agents or employees, to put into effect, or observe, any of the provisions of said Acts, or either of them; and that the said tariffs, freight and passenger, prescribed by said Acts, and each and every of the provisions of said Acts, and of each of them, be declared to be unreasonable, unfair and unjust to the complainant, and unconstitutional, null and void.

That in the meantime, and until a decision can be had upon your complainant's motion for the injunction herein prayed, a restraining order may be granted, restraining the acts sought herein to be enjoined, your complainant hereby averring that there is danger of irreparable injury from delay if action should not be taken until such motion for an injunction can be tried upon its merits.

That a writ of injunction be issued, etc., commanding, etc., enjoining the defendants as above prayed.

That on a final hearing said injunction as herein prayed may be made perpetual; that the said Act ratified March 9, 1907, and the said Act ratified March 2, 1907, providing for said freight and passenger tariffs, respectively, may each of them be declared null and void by a decree of this court, so far as the same relate to any of your complainant's said lines of railroad in North Carolina, or to any of its business, and that your complainant may have such other and further relief as in justice it may be entitled to, and as to equity is meet.

That this complainant may have leave to make, by supplemental process, as new parties defendant, as occasion may require, any person or corporation who may appear asserting against this complainant, or against any of its officers, agents or employés, any

alleged right or remedy under either of said acts, or otherwise, because of the failure of the complainant, or any of its officers, agents or employés, to put into effect, or to observe, any rate mentioned in either of said acts or any other provision of said acts, or either of them.

149 May it please your Honors to grant unto your complainant the temporary restraining order aforesaid, the writ of injunction aforesaid, and the writ of subpœna addressed to said defendants Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, individually, and as constituting the Corporation Commission of North Carolina, and Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, commanding said defendants, under a penalty therein named, to appear in this court, on some certain day, to be thereby fixed, to answer the premises and abide by and perform such decree as may be passed herein, but said answer as above stated not to be made on oath, answer under oath being expressly waived.

This is the first application by your complainant for a restraining order or injunction in this case.

SOUTHERN RAILWAY COMPANY,
Complainant,
By J. M. CULP, *Vice President.*

CLAUDIAN B. NORTHROP,
W. B. RODMAN,
Solicitors for Complainant.
FRANCIS LYNDE STETSON,
ALEX. P. HUMPHREY,
WALKER D. HINES,
ALFRED P. THOM,
Of Counsel.

150 UNITED STATES OF AMERICA, *District of Columbia, To wit:*

Personally appeared before me, Pearce Horne, a Notary Public, duly commissioned, qualified and acting as such in and for the District of Columbia, J. M. Culp, who, upon being first duly sworn deposes and says:

That he is Vice President of the Southern Railway Company, the complainant in the foregoing bill of complaint; that he has personal supervision of the traffic of said Company; that he has read the foregoing bill and knows the contents thereof; that the facts therein stated, as of complainant's own knowledge, are true; and that the facts therein stated upon complainant's information and belief, he believes to be true.

J. M. CULP.

Sworn and subscribed to before me this 6th day of May in the year 1907.

My commission as Notary Public expires on the 17th day of January, 1911.

In witness whereof I have hereunto signed my name and affixed my notarial seal at the city of Washington in the District of Columbia, this 6th day of May in the year 1907.

PEARCE HORNE,
Notary Public.

151 EXHIBIT No. 1.

AN ACT

AUTHORIZING THE PURCHASERS OF THE RICHMOND AND DANVILLE RAILROAD, THEIR ASSIGNS AND SUCCESSORS, TO BECOME AND BE A CORPORATION, TO ADOPT A NAME THEREFOR, AND TO POSSESS AND EXERCISE GENERAL POWERS; AND AUTHORIZING THE LEASING TO OR BY, AND THE CONSOLIDATION THEREWITH OF, OTHER CORPORATIONS.

[Approved February 20, 1894.]

Whereas, a certain suit in equity is now pending in the Circuit Court of the United States of America for the Eastern District of Virginia, wherein the Central Trust Company of New York is complainant, and the Richmond and Danville Railroad Company, a corporation created by and existing under the Laws of the State of Virginia, is defendant, in which suit it is sought to foreclose the consolidated mortgage, dated the twenty-second day of October, in the year one thousand eight hundred and eighty-six, and upon or about that day duly executed, acknowledged and delivered by said railroad corporation to said Central Trust Company of New York, and subsequently supplemented and confirmed by said railroad corporation by instruments dated November first, eighteen hundred and eighty-six, and April thirtieth, eighteen hundred and eighty-eight, respectively, in which suit also it is proposed to sell the whole of the mortgaged property and premises, being the rights, property, privileges and franchises of the said the Richmond and Danville Railroad Company.

And, whereas, it is deemed desirable and for the interest of this Commonwealth that the said railroad property shall be sold and reorganized in such manner and under such conditions as to secure the largest and best possible facilities and advantages of transportation and communication for the people of this State; now, therefore:

1. *Be it enacted by the General Assembly of Virginia,* that the purchaser or purchasers of the said mortgaged premises of the said the Richmond and Danville Railroad Company at the foreclosure sale thereof in the course of the said suit in equity, and such person or persons as he or they may associate with himself or themselves, shall forthwith be, and they hereby are, constituted a body politic and corporate by the name which they may select, as set forth in the conveyance of said mortgaged premises, or in any writing signed by him or them and recorded in the court in which the said conveyance shall be recorded, and such new corporation shall have,

possess and be invested with all the estate, right, title and interest in and to such railroad and other property, with their appurtenances, and all the franchises, rights and privileges had and pos-
152 sessed by the said Richmond and Danville Railroad Company to the same extent as a purchaser under sections twelve hundred and thirty-three and twelve hundred and thirty-four of the Code of Virginia, and shall perform all the duties prescribed by said sections of said Code; provided, however, that said new corporation shall not be limited as to the amount or classification of its stock or bonds, except that the total amount of stock issued shall not exceed three hundred and fifty million dollars, and shall have no immunity from any lawful State, county or municipal taxation by reason of its former charter or any law heretofore exempting it from taxation.

2. Such purchaser or purchasers may associate with him or them any number of persons in the organization of the new corporation, which may create and issue its stock and its bonds secured by mortgage or otherwise, according to any plan adopted by such purchaser or purchasers, and filed as hereinafter provided.

3. It shall be the duty of such new corporation within six months after the conveyance to it of said mortgaged premises to execute a certificate in writing under its common seal attested by the signature of its President or Vice-President, referring to the sale and conveyance by which it shall have acquired title to such premises and the plan of organization adopted by the purchasers, the amount and classes or kinds of capital stock and mortgage bonds or other obligations authorized to be issued, and also specifying the name of such new corporation and of its President, and the number and names of its Directors, which certificate shall be filed in the office of the Secretary of the Commonwealth of Virginia, and a certified copy thereof shall be conclusive evidence of the existence of such new corporation.

4. In addition to its other powers, such new corporation shall have, and from time to time as occasion arises may exercise, the following powers, or any of them, namely:

(*a*) With the approval of a majority of its stockholders, given at a meeting, it may, from time to time, lease, use, operate, consolidate with, or purchase or otherwise acquire, or be leased, used, operated by, or consolidated with, any railroad or transportation company now or hereafter incorporated by the laws of the United States, or any of the States thereof, or any one or more of such railroad or transportation companies, or any other railroad or transportation company or companies which now are or hereafter may be leased, or used, or operated by, or consolidated with any one or more of such railroad or transportation companies; and, from time to time, it may consolidate its capital stock, property and franchises, by change of name or otherwise, with the capital stock, property and franchises of any other railroad or transportation company, power being hereby granted to any railroad or transportation company or companies incorporated by or under any act or acts of the General Assembly of the State of Virginia, with the approval of a majority in amount

of its or their shareholders respectively given at any meeting, to make and carry out such contracts of consolidation, or lease, sale or other method of acquistion; *provided* that, in all consolidations, a copy of the agreement therefor shall be filed in the office of the Secretary of the Commonwealth of Virginia, and that any corporation with which said new corporation may consolidate, or
153 which it may lease, shall be or remain subject to the jurisdiction of the courts of this State, and all lines of railroad operated by it in the State of Virginia shall be subject to the general laws of the State; and *provided, further,* that any stockholder who dissents from any such consolidation may within sixty days thereafter apply by petition to the Circuit Court of the City of Richmond to determine the value of his stock, and shall be entitled to receive from the new corporation the value as thus determined of such stock upon transfer thereof to the new corporation.

(*b*) It may from time to time purchase, own and hold bonds or other evidences of debt, and shares of the capital stock of any railroad company or companies formed under the laws of this or any other State, and from time to time may guarantee or assume the bonds, evidences of indebtedness or capital stock of any such railroad company.

(*c*) It may from time to time acquire or guarantee the stocks and bonds, or either, of any inland, coast or ocean transportation company or companies, operating to or from any point or points on its lines; and it may develop or aid in the development of its business, by acquiring or guaranteeing the stocks and bonds, or either, of hotel, lighterage, wharf, elevating and other such enterprises convenient in connection therewith or as part thereof.

5. Said new corporation may issue its capital stock of one or more classes or kinds, and in one or more series or grades, with such preferences, conditions and voting power as shall be provided in said plan of organization, and, from time to time, it may increase or decrease the amount of any class or kind or grade of such stock as shall be provided in said plan of reorganization, or with the approval of a majority in amount of the stockholders, given at a meeting of stockholders called for that purpose, unless and except as otherwise expressly provided in certificates representing stock previously issued. The shares of each class of stock shall be of such par amount, and shall entitle the holders to such vote, respectively, as shall be determined in the said plan of reorganization, or by the stockholders in like manner.

6. Such new corporation may borrow money and issue bonds or other evidence of indebtedness therefor, and may secure the same, from time to time, by mortgage or deed of trust upon any or all of its property and franchises, and such new corporation, from time to time, may issue and sell its bonds and its capital stock at such prices and on such terms as shall be specified in said plan of organization, or as a majority in amount of the stockholders shall approve at any meeting, and may receive in payment therefor property, securities or shares in any corporation mentioned in this act, and any stock so issued shall be deemed fully paid and free from any liability.

7. The business, property and concerns of said corporation shall be managed by a Board of Directors consisting of not less than five members, and one of their number shall be chosen as President. The stockholders may adopt by-laws for the government of the stock, property and concerns of the corporation, and for the regulation of its directors, officers and agents, and in and by such by-laws the stockholders may prescribe how such by-laws may be amended or repealed; provided, however, that until such by-laws shall be adopted by the stockholders the corporation shall be governed by by-laws adopted in accordance with the plan of organization.

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8. The principal office of the Company shall be in the City of Richmond, in this State, at which all meetings of the stockholders shall be held; and all other offices and workshops of said Company shall be located in the State of Virginia, as far as the same may be practicable.

9. It shall be lawful for the Circuit Court of the City of Richmond, upon the petition of the President and Board of Directors, at any time to order a change in the name of the Company; but any such change of name shall be without prejudice to the rights of any creditor, or to the exercise of any of the powers and privileges granted by this act.

10. There shall be paid to the Clerk of the county or corporation in which any mortgage authorized by this act may be presented for recordation, the existing rate of taxation for such recordation upon the assessed value of the road-beds, depots, station buildings and lots, and machine shops, fixtures and rolling stock, and any real estate not included in said enumeration, in the State of Virginia, conveyed in such mortgage; and upon presentation to the Clerk of the county or corporation where it is proposed to record said mortgage of a certificate of the Auditor of the State of the amount of the assessed values of the said property within the State of Virginia, and upon the payment of the tax thereon to the said Clerk, the said mortgage shall be recorded without other charge than the clerical fees provided in such cases. Certified copies of such mortgage may be recorded in any county of Virginia in which property covered by such mortgage may be located upon payment of clerical fees.

11. All taxes and debts due or to become due the State of Virginia by the corporation shall be paid in lawful money of the United States, and not in coupons.

12. This act shall be in force from its passage.

A true copy.
Teste:

____ ____,
Clerk of the House of Delegates and
Keeper of the Rolls of Virginia.

Date, ——, —.

155 SOUTHERN RAILWAY COMPANY.

Certificate.

STATE OF VIRGINIA, *City of Richmond, ss:*

Southern Railway Company, a corporation organized and existing under and pursuant to the provisions of an Act of Assembly of the State of Virginia, approved February 20, 1894 (of which act a copy, marked "Schedule D," is hereunto annexed and made a part of this certificate), entitled—

"An Act authorizing the purchasers of the Richmond and Dan-"ville Railroad, their assigns and successors, to become and be a "corporation, to adopt a name therefor, and to possess and exercise "general powers; and authorizing the leasing to or by, and the con-"solidation therewith of, other corporations,"

in conformity to the requirements of Section 3 of the said act, does hereby certify as follows, viz:

First. The said Southern Railway Company, upon June 18, 1894, did acquire title to the rights, property, privileges and franchises of the Richmond and Danville Railroad Company embraced in and covered by its consolidated mortgage to the Central Trust Company of New York, dated October 22, 1886, under and by means of the following sale and conveyance, viz:

(1) *The sale of the said mortgaged premises* was held in the City of Richmond, on the 15th day of June, 1894, under a decree of foreclosure and sale entered on the 13th day of April, 1894, in a certain suit in equity pending in the Circuit Court of the United States of America for the Eastern District of Virginia, wherein the Central Trust Company and others were complainants and the Richmond and Danville Railroad Company was defendant, in which suit it was sought to foreclose the said consolidated mortgage, and also to sell the whole of the mortgaged property and premises, being the rights, property, privileges and franchises of said the Richmond and Danville Railroad Company, at which sale the mortgaged premises were bid in by and struck off to Charles H. Coster and Anthony J. Thomas, a Purchasing Committee, as purchasers thereof, with the intent and for the purpose of vesting the same in the said Southern Railway Company thereafter to be organized by the said purchasers and their associates, pursuant to the laws of the State of Virginia.

(2) *The conveyance of the said mortgaged premises* was made pursuant to the order of the Circuit Courts of the United States of America, by the Special Masters in said suit, Matthew F. Pleasants, Thomas S. Atkins and Charles Price, upon the 18th day of June, 1894, to the said Charles H. Coster and Anthony J. Thomas, as Purchasing Committee for the benefit of the said Southern Railway Company, such conveyance having been duly recorded on the
156 said 18th day of June, 1894, in the Chancery Court of the City of Richmond, in the State of Virginia.

Second. *The plan of organization adopted by the purchasers* is that of which a copy is hereunto annexed, marked "Schedule B" and made part of this certificate.

Third. *The amount and classes or kinds of capital stock* already authorized to be issued by the new corporation (subject to increase up to but not exceeding the limit prescribed by said act) were and are:

One million two hundred thousand shares of common stock, and six hundred thousand shares of preferred stock, each and every of such shares being of the par value of one hundred dollars each, and the aggregate par value of such shares being one hundred and eighty million dollars.

The preferences, conditions and voting power of such capital stock are as set forth in the said plan of organization hereunto annexed, marked "Schedule B."

Fourth. *The amount and classes or kinds of mortgage bonds or other obligations heretofore* authorized to be issued by said corporation are bonds secured by mortgage payable as therein specified, and, except as and when registered as therein provided, being negotiable instruments, passing by delivery, free from any and all defences against the holder thereof, such bonds having been authorized to the amount of one hundred and twenty-four million five hundred thousand dollars, including what are known as its *"East Tennessee Reorganization Mortgage Bonds,"* for the aggregate amount of $4,500,000, and its *"First Consolidated Mortgage Gold Bonds,"* for the aggregate amount of $120,000,000, of which last-mentioned bonds a large part are not now to be issued, but are reserved for various purposes mentioned in the mortgage securing said bonds, dated October 2, 1894, and duly recorded November 9, 1894, in the office of the Clerk of the Chancery Court of the City of Richmond, in the State of Virginia, and also in other offices; and among other purposes for the redemption and payment in due course of the bonds of the Richmond and Danville Railroad Company, secured by its two mortgages to Central Trust Company of New York, as Trustee, dated respectively October 5, 1874, and February 1, 1882, such last-mentioned mortgage having been amended by agreement dated July 24, 1894, between the said Central Trust Company and the said Southern Railway Company, a part of the mortgaged premises first above mentioned having been sold and purchased subject thereto, and such bonds have been and are assumed by the Southern Railway Company; and also for the payment and redemption in due course of the said *"East Tennessee Reorganization Mortgage Bonds;"* and also for the redemption and payment on July 1, 1909, of such of the first mortgage bonds of the Charlotte, Columbia and Augusta Railroad Company as shall have been extended in accordance with the provisions of an agreement made July 5, 1894, between the Southern Railway Company and the Maryland Trust Company, the holders of all such extended bonds then outstanding being entitled to exchange the same at par for like amount of the said First Con-
157 solidated Mortgage Bonds, interest to be adjusted properly at the time of every such exchange.

"Schedule A," hereunto annexed, is a list of the properties now embraced in the Southern Railway System, and is also a statement of bonds and obligations issued or assumed by or chargeable upon property purchased by Southern Railway Company under its said charter, "Schedule D," and showing the letter date of issue, number of bonds, amount of issue, rate of interest, and when and where payable; the only bonds issued directly by Southern Railway Company being those issued under the two mortgages first above mentioned, dated October 2, 1894.

Fifth. The name of the new corporation is "Southern Railway Company," and the name of its President is Samuel Spencer.

Sixth. The Directors of the new corporation are nine in number, and their names are:

Aubin L. Boulware, Richmond, Va.
Charles H. Coster, New York, N. Y.
Harris C. Fahnestock, New York, N. Y.
Thomas F. Ryan, do.
Samuel Spencer, do.
Anthony J. Thomas, do.
Samuel Thomas, do.
Skipwith Wilmer, Baltimore.
*J. Hood Wright, New York.

In witness whereof, the said Southern Railway Company has executed this certificate under and by its common seal, attested by the signature of its President, this fourth day of December, 1894.

SAMUEL SPENCER,
President of the Southern Railway Company.

[Seal of Southern Railway Company.]

Attest:
W. A. C. EWEN, *Secretary.*

STATE OF NEW YORK, *City and County of New York, ss:*

I, George H. Corey, a Commissioner of Deeds for the State of New York, thereto duly appointed by the Governor of the State of Virginia, and a Notary Public for the said City and County of New York, thereto duly appointed by the Governor of the State of New York, do hereby certify that Samuel Spencer, whose name is signed to the foregoing and hereto annexed certificate bearing date the fourth day of December, 1894, as President of the Southern Railway Company, with whom I am personally acquainted, and who is personally known to me to be the President of the Southern Railway Company, the corporation described in and which executed the said certificate, personally appeared before me at my office in my said County and corporation, for himself and on behalf of the Southern Railway Company, and being informed of the contents of the
158 said certificate, he did on this day acknowledge the due execution of the foregoing certificate on the day the same bears

*A vacancy exists because of Mr. Wright's death, November 12, 1894.

date; and further acknowledged that he voluntarily executed, signed and sealed the said certificate as his free act and deed, and as the free act and deed of the said Southern Railway Company, for the purposes and uses therein mentioned.

And the said Samuel Spencer, being by me first duly sworn did depose and say: That he resides in the City of New York, in the State of New York; that he is the President of the Southern Railway Company; that he knows the corporate seal of the said Company; that the seal affixed to the foregoing instrument is the corporate seal of the said Company, and was thereto affixed by authority of the Board of Directors of the said Company, and that he signed his name thereto by like authority as President of said Company.

In witness whereof, I have hereunto set my hand and seals of office as Commissioner of Deeds for the State of Virginia and as Notary Public for the City and County of New York, in the State of New York, at my office, this fourth day of December, 1894.

[Seal of George H. Corey, Commissioner for Virginia.]

GEO. H. COREY,
Commissioner for the State of Virginia in New York.

[Seal of George H. Corey, Notary Public, New York.]

GEO. H. COREY,
Notary Public for the City and County of New York in the State of New York.

STATE OF NEW YORK, *City and County of New York, ss:*

I, Henry D. Purroy, Clerk of the City and County of New York, and also Clerk of the Supreme Court in said City and County, the same being a court of record do hereby certify that George H. Corey, whose name is subscribed to the certificate of acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment a Notary Public in and for the City and County of New York, dwelling in the said City, commissioned and sworn, and duly authorized to take the same and to administer oaths; and, further, that I am well acquainted with the handwriting of said Notary Public, and verily believe that the signature to the said certificate of acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 12th day of December, 1894.

[Seal of the Supreme Court, City and County of New York.]

HENRY D. PURROY, *Clerk.*

159 "SCHEDULE A."

(*a*) LINES OF WHICH THE OWNERSHIP HAS BEEN ABSOLUTELY MERGED INTO THE SOUTHERN RAILWAY COMPANY (OR THE COMPANIES OF LIKE NAME IN KENTUCKY AND MISSISSIPPI) BY PURCHASE AT FORECLOSURE OF BY OTHER CONVEYANCE:

Richmond, York River & Chesapeake	about	39.	miles.
Richmond & Danville	"	145.53	"
Piedmont	"	48.	"
Washington, Ohio & Western	"	50.12	"
Western North Carolina	"	307.	"
Statesville & Western	"	20.36	"
Northwestern North Carolina	"	100.15	"
Clarksville & North Carolina	"	7.03	"
Oxford & Clarksville	"	49.32	"
Oxford & Henderson	"	12.94	"
Atlantic, Tennessee & Ohio	"	.44	"
Charlotte, Columbia & Augusta	"	190.53	"
Columbia & Greenville	"	164.98	"
Georgia Pacific	"	552.	"
East Tennessee, Virginia & Georgia	"	1,254.40	"
Louisville Southern	"	123.88	"
			3,109.24 miles.

(*b*) OPERATED LINES OF WHICH ALL OR NEARLY ALL THE STOCK IS OR IS EXPECTED TO BE OWNED BY SOUTHERN RAILWAY COMPANY:

Virginia Midland* and branches (leased)	about	400.70	miles.
High Point, Randleman, Asheboro & Southern (all bonds also owned)*	"	27.81	"
North Carolina Midland (all bonds also owned)*	"	26.11	"
Elberton Air Line (all bonds also owned)*	"	50.36	"
Roswell	"	9.11	"
Yadkin*	"	41.17	"
State University (no bonds issued)	"	10.20	"
			565.46 miles.

*MEMO.—It is intended, later on, to bring about a conveyance of these lines to the Southern Railway Company.

160 (*c*) LEASED LINES:

North Carolina Railroad	about 223.20 miles.	
Atlanta & Charlotte	" 268.54 "	
		491.74 miles.

(*d*) LINES OPERATED UNDER VARIOUS ARRANGEMENTS:

Lawrenceville (all bonds and majority of stock owned, but line is of no value and has been discontinued)	9.61 miles.	
Richmond & Mecklenburg (all second mortgage bonds and most of stock owned)	31.45 "	
Asheville & Spartanburg, and Spartanburg, Union & Columbia (operated temporarily for account of first mortgage bondholders)	133.90 "	
		174.96 "
(*e*) KNOXVILLE & OHIO RAILROAD (nearly all the stock owned)		66.00 "
(*f*) BALTIMORE, CHESAPEAKE & RICHMOND STEAMBOAT LINE (all the stock and all certificates of debt owned)		200.00 "
Total mileage		about 4,607.40 miles.

(*g*) LINES OPERATED INDEPENDENTLY IN WHICH SOUTHERN RAILWAY COMPANY IS INTERESTED AS BONDHOLDER:

Danville & Western	about 70. miles.	
Chester and Lenoir, north end	" 33. "	
Blue Ridge (believed to be of no value)	" 34.02 "	
Laurens (believed to be of no value)	" 29.90 "	
Milton & Sutherlin (believed to be of no value)	" 6.50 "	
Hartwell	" 10.10 "	
		183.52 miles.
Grand total		about 4,790.92 miles.

"SCHEDULE A"—*Continued.*

SOUTHERN RAILWAY COMPANY.

Outstanding Mortgage and Obligations.

Principal and Interest payable, except as otherwise specified, in the City of New York.

Name of railroad company.	Description of bond or obligation.	Due.	Int.	Amount.
	A.			
	On properties merged into Southern Railway Company.			
Richmond & Danville	Consolidated gold 6 %	Jan., 1915	J & J.	$5,997,000.00
do.	Debenture 5s (formerly 6s), earliest coupon April, 1896	April, 1927	A. & O.	3,368,000.00
do.	Equipment S. F. gold 5 % (1)	Sept., 1909	M. & S.	1,194,000.00
Richmond, York River & Chesapeake	Equipment Notes	Various		507,835.00
do. do.	First Mortgage 5 %	Jan., 1910	J. & J.	400,000.00
Washington, Ohio & Western	Second Mortgage 4½ %	Nov., 1910	M. & N.	500,000.00
Atlantic, Tennessee & Ohio	First Mortgage 4 %	Feb., 1924	F. & A.	1,025,000.00
Western North Carolina	First Mortgage 6 %	April, 1913	A. & O.	150,000.00
Charlotte, Columbia & Augusta	First Mortgage gold 6 %	July, 1914	J. & J.	2,531,000.00
do. do.	First Mortgage gold 7 %, due January 1, 1895, extended at 5 % to July, 1909	July, 1909	J. & J.	2,000,000.00
Columbia & Greenville	Second Mortgage 7 %, earliest coupon October, 1895	Oct., 1910	A. & O.	500,000.00
Georgia Pacific	First Mortgage gold 5% to January, 1898, 6% thereafter	Jan., 1916	J. & J.	2,000,000.00
do.	First Mortgage gold 5% to January, 1898, 6% thereafter	Jan., 1922	J. & J.	5,660,000.00
do.	Equipment S. F. gold	Various	F. & A.	787,000.00
East Tennessee, Virginia & Georgia	Equipment Notes	Various		359,005.54
do. do.	Divisional Mortgage 7 %	July, 1900	J. & J.	3,123,000.00
do. do.	Divisional Mortgage gold 5 %	July, 1930	J & J	3,106,000.00
do. do.	Consolidated gold 5 %	Nov., 1956	M & N.	12,770,000.00
Alabama Central	Equipment Notes (including Louisville Southern)	Various		415,[illegible]1.59
Southern Railway	First Mortgage gold 6 %	July, 1918	J. & J.	1,000,[illegible].00
	East Tennessee Reorganization dated October 2, 1894, for old Equipment and Improvement bonds, gold, 4 % to March, 1898, inclusive, 5 % thereafter	Mar., 1938	M. & S.	4,500,000.00

(1) Also payable in London, England.

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JAMES H. WOOD.

THIS PAGE BOUND VERTICAL IN BOOK

162 Name of railroad company.	Name of bond.	Due.	Int.	Amount.
	B.			
	On properties practically owned by (*) or leased to (†) Southern Railway Company.			
*† Virginia Midland	Serials (1)	Various....	M. & S.	$7,635,000.00
*† do.	General Mortgage 5 %	May, 1936	M. & N.	4,859,000.00
*† Charlottesville & Rapidan	First Mortgage 6 % (2)	July, 1913	J. & J.	421,700.00
*† Franklin & Pittsylvania	First Mortgage 6 % (3)	July, 1913	J. & J.	79,000.00
† Atlanta & Charlotte Air Line	Preferred Mortgage 7 %	April, 1897	A. & O.	500,000.00
† do. do.	First Mortgage 7 %	Jan., 1907	J. & J.	4,250,000.00
† do. do.	Income 6 %	April, 1900	A. & O.	750,000.00
† do. do.	Stock 5–6 %	.....	M. & S.	1,700,000.00
† North Carolina	Rental Equivalent to 6½ % on stock	Sept., 1901	J. & J.	4,000,000.00
* Knoxville & Ohio	First Mortgage gold 6 %	July 1, 1925	J. & J.	2,000,000.00
	C.			
	On all the property of the Southern Railway Company, including leaseholds, stocks and bonds.			
Southern Railway	First Consolidated Mortgage gold 5 % dated October 2, 1894—total issue $120,000,000, of which:	July, 1994	J. & J.	
	Reserved to take up foregoing bonds, stocks, &c...	$78,088,372.13		
	do. for new construction and other purposes.	20,000,000.00		
	To be issued now	21,911,627.87	.....	21,911,627.87
	Total existing debt Southern Railway Company		.....	$100,000,000.00

(1) Interest payable in Baltimore, Md.
(2) Interest payable in Philadelphia, Pa.
(3) Interest payable in Baltimore, Md.

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"SCHEDULE B."

Southern Railway Company.

The purchasers of the railroad and other property of the Richmond and Danville Railroad Company, at the foreclosure sale thereof held in the City of Richmond on the 15th day of June, 1894—viz., Charles H. Coster and Anthony J. Thomas and their associates—constituting Southern Railway Company, a corporation organized and existing under the laws of the State of Virginia, and particularly an Act of Assembly of said State entitled—

"An Act authorizing the purchasers of the Richmond and Dan-
"ville Railroad, their assigns and successors, to become and be a
"corporation, to adopt a name therefor, and to possess and exercise
"general powers, and authorizing the leasing to or by, and the con-
"solidation therewith of, other corporations," approved February 20, 1894,

have adopted and adopt the following as

The Plan of Organization.

First. The said purchasers and the Southern Railway Company have accepted and do accept the before-mentioned Act of Assembly of the State of Virginia, and, anything herein contained or herefrom omitted to the contrary notwithstanding, they do reserve and retain the right from time to time and at all times to exercise and enjoy any and every right, power, privilege and franchise conferred in and by said Act of Assembly of the Commonwealth of Virginia approved February 20, 1894, or by any other act or law of which the Southern Railway Company may lawfully claim the benefit.

Second. The said purchasers and the Southern Railway Company have fixed the capital stock of the corporation at $180,000,000, divided into one million eight hundred thousand shares of the par value of $100 each, of which six hundred thousand shares are preferred stock and the remainder are common stock, reserving the right to increase such capital stock up to, but not exceeding, the limit authorized by the said Act of Assembly of the Commonwealth of Virginia approved February 20, 1894, and to increase or decrease the amount of any class or kind or grade of its capital stock, and also reserving any and all right to redeem and purchase at par any and all preferred stock, or any kind, class or grade thereof.

The Preferred Stock is entitled to the following preferences, and to no other—viz:

In each and every fiscal year after the first day of July, 1895, to receive non-cumulative dividends at and up to the rate of five per cent. per annum in preference and priority to the payment of any dividend on the Common Stock in such fiscal year, but only from
164 the net profits of the Company as such shall be fixed and determined by the Board of Directors, and only when and as such Board shall declare dividends therefrom; but, notwith-

standing the preference hereby declared, if, after providing for the payment of dividends for any fiscal year on the Preferred Stock outstanding in such year, there shall remain a surplus of net profits of such year, the Board of Directors may declare and pay dividends upon any other stock of the Company for such year out of such surplus net profits.

Such Preferred Stock is authorized to the amount of Sixty Million Dollars; and, without the consent of the holders of a majority of such Preferred Stock then outstanding, the Company can neither increase such authorized amount thereof nor put upon its property any mortgage to secure bonds for more than the aggregate principal sum of one hundred and twenty million dollars, in addition to prior liens thereon, assumed, extended or renewed, or any substitutions therefor, against which a like amount of bonds shall be reserved out of such amount of $120,000,000.

The conditions and voting power in respect of and belonging to all such stock are as follows:

With the exception of one thousand shares of common stock, heretofore issued or reserved to qualify Directors, or for other purposes, all of the stock of the Company—viz., 1,199,000 shares of common stock and 500,000 shares of preferred stock—have been duly issued and have been duly delivered to J. Pierpont Morgan, Charles Lanier and George F. Baker and their successors, as Voting Trustees, under an agreement dated October 15, 1894, with the exclusive right and privilege, in the said Voting Trustees during the continuance of their trust, as stated in said agreement, to vote upon and in respect of all such stock so issued to them, and also to collect and receive any dividends declared in respect of such stock, and to distribute any such dividends among the holders of their stock-trust certificates, which holders in due course will be entitled to receive in exchange therefor certificates for corresponding amounts and kinds of the capital stock of this Company then entitling them to one vote for each share thereof, and in the meantime to receive payments equal to the dividends, if any, collected by the Voting Trustees upon such number of such shares standing in the name of the Voting Trustees, who, until after the actual delivery of such stock certificates, shall possess and shall be entitled to exercise all rights of every name and nature, including the right at each and every corporate meeting or election to cast one vote for and in respect of each and every share of the capital stock of the Southern Railway Company on account of which such stock-trust certificates shall be issued, it being expressly stipulated that no voting right passes from the Company or from the Voting Trustees by, under or in respect of any such stock-trust certificate, or by or under any agreement expressed or implied.

165 Third. The prices and terms upon which the Southern Railway Company from time to time has issued and sold or shall issue and sell its bonds and its capital stock are those which heretofore have been or from time to time hereafter shall be approved by a majority in amount of the stockholders at their meetings, bonds to the aggregate amount of $124,500,000 having been

heretofore authorized for all purposes, including the payment of all prior liens.

Fourth. The By-Laws of the Southern Railway Company are those which, on the fifth day of July, 1894, were duly adopted by the Board of Directors of said Company at its first meeting, and upon the same day adopted and ratified by the stockholders at their first meeting, subject to the amendments thereto from time to time adopted and to be adopted as therein provided, and the officers and duties of the officers of the Company shall be as provided by such By-Laws, a true copy of such By-Laws, as amended to this date, being hereunto annexed, marked "Schedule C," forming part of this plan of organization.

In witness whereof, the said purchasers—Chas. H. Coster and Anthony J. Thomas—have hereunto subscribed their names, and the Southern Railway Company has caused its common seal to be hereunto affixed and to be attested by the signature of its President this fourth day of December, 1894.

C. H. COSTER.
ANTHONY J. THOMAS.

[Seal of Southern Railway Company.]

SOUTHERN RAILWAY COMPANY,
By SAMUEL SPENCER, *President.*

STATE OF NEW YORK, *City and County of New York, ss:*

I, George H. Corey, a Commissioner of Deeds for the State of New York, thereto duly appointed by the Governor of the State of Virginia, and being also a Notary Public for the said City and County of New York, thereto duly appointed by the Governor of the State of New York, do hereby certify that Charles H. Coster and Anthony J. Thomas, whose names are signed to the writing hereto annexed, bearing date on the fourth day of December, 1894, have severally acknowledged the same before me in my State and corporation aforesaid.

And I do further certify that in my said State and corporation, on this fourth day of December, 1894, before me personally appeared Samuel Spencer, whose name is signed to the foregoing and hereto annexed Plan of Organization, bearing date the fourth day of December, 1894, as President of the Southern Railway Company, the corporation described in and which executed the said plan, and for himself and in behalf of the said Southern Railway Company, being informed of the contents of the said plan, did on this day acknowledge the due execution of the plan on the day the same bears date; and further acknowledged that he voluntarily executed, signed,
sealed and delivered the said plan as his free act and deed,
166 and as the free act and deed of the said Southern Railway
Company, for the uses and purposes therein mentioned, and for the purposes therein contained:

And the said Samuel Spencer, being by me first duly sworn, did depose and say: That he resided in the City of New York; that he is

President of the said Southern Railway Company; that he knows the corporate seal of the said Company; that the seal affixed to the foregoing Plan is the corporate seal of the said Company, and was thereto affixed by authority of the Board of Directors of the said Company, and that he signed his name thereto by like authority as President of said Company.

In witness whereof, I have hereunto set my hand and seals of office as Commissioner of Deeds for the State of Virginia, and as Notary Public for the City and County of New York, at my office, this fourth day of December, 1894.

[Seal of George H. Corey, Commissioner for Virginia.]

GEORGE H. COREY,
Commissioner for the State of Virginia in New York.

[Seal of George H. Corey, Notary Public, New York.]

GEORGE H. COREY,
Notary Public for the City and County of New York in the State of New York.

STATE OF NEW YORK, *City and County of New York, ss:*

I, Henry D. Purroy, Clerk of the City and County of New York, and also Clerk of the Supreme Court in said City and County, the same being a court of record, do hereby certify that George H. Corey, whose name is subscribed to the certificate of acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment a Notary Public in and for the City and County of New York, dwelling in the said City, commissioned and sworn, and duly authorized to take the same and to administer oaths; and, further, that I am well acquainted with the handwriting of said Notary Public, and verily believe that the signature to the said certificate of acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 12th day of December, 1894.

[Seal of the Supreme Court, City and County of New York.]

HENRY D. PURROY, *Clerk.*

167 "SCHEDULE C."

BY-LAWS

OF THE

SOUTHERN RAILWAY COMPANY,

December 4, 1894.

Stockholders.

1. The annual meeting of the Stockholders, for the purpose of electing Directors, and for the purpose of transacting such other business as may come before the meeting, shall be held on the Tuesday preceding the last Tuesday in October of each year, at the office of the Company in the City of Richmond, Virginia, and notice thereof shall be given for two successive weeks in a newspaper published in the City of Richmond.

2. A general meeting of the Stockholders may be held at any time upon the call of the Board of Directors, or Stockholders holding together one-tenth of the capital stock, upon their giving notice of the time and place for such meeting for thirty days in one of the principal newspapers published in the City of Richmond, the City of Knoxville, Tennessee, and the City of New York.

3. To constitute a meeting of Stockholders, there must be present, either in person or by proxy, those who can give a majority of all the votes which could be given by all the Stockholders. If a sufficient number fail to attend at the time and place for the meeting, those who do attend may adjourn from time to time until a meeting shall be regularly constituted. A meeting of Stockholders may adjourn from time to time until their business is completed. No notice shall be necessary for the holding of an adjourned meeting.

4. At any meeting of the Stockholders each Stockholder may, in person or by proxy, duly appointed by instrument in writing subscribed by such Stockholder, duly attested, and filed with the Secretary at or before the meeting, give one vote on each share of stock held by him in the same right.

5. In order to effect an organization, the meeting shall be called to order by the President, or in his absence by the First, Second or Third Vice-President, in the order named, and a Chairman shall be elected. In the absence of the President and all the Vice-Presidents, any Stockholder, or the duly appointed proxy of any Stockholder, may call the meeting to order. The polls shall be opened as soon as the organization of the meeting shall admit of, and shall be kept open for one hour, under the supervision of three Tellers, who shall have been previously appointed by the Board of Directors; or if not so appointed, or, if in case of appointment, all or any of them shall fail to act, appointments to fill the vacancies shall be made at such meeting by its Chairman. The votes for Directors, or

for determining any other question as above provided, shall
168 be by ballot, and each Stockholder shall be entitled to one vote for each share of stock held by him.

As soon as may be after the polls are closed, the Tellers shall make and subscribe, and report to the meeting, a certificate of the result of the election, which shall be entered at large on the records; and thereupon each person elected shall be notified by the Secretary of his election.

The Directors may be residents of any part of the United States. In case any person elected shall not, within thirty days after date of the notice of his election, signify his acceptance, the Board of Directors may declare a vacancy to exist.

6. Certificates of stock, signed by the President or one of the Vice-Presidents and by the Secretary or Assistant Secretary, and sealed with the corporate seal of the Company, shall be issued to the Stockholders, subject to such rules and regulations as the Board of Directors may from time to time prescribe; and transfers of certificates shall be made only on the books of the Company, on the written order of the holder of his duly-appointed attorney, upon surrender of the original certificate. The transfer books shall be closed for at least ten days previous to, and on the day of, the annual meeting, and at and for such other times as the Board of Directors shall order.

7. When a person to whom such a certificate is issued alleges it to have been lost, he shall file in the office of the Company, first, an affidavit setting forth the time, place and circumstances of the loss; second, proof of his having advertised the same, in a newspaper of general circulation published in the City of New York, once a week for two successive months; and, third, a bond to the Company with one or more sufficient sureties, with condition to indemnify all persons against any loss in consequence of issuing a new certificate in place of the former; and thereupon the Board of Directors may cause a new certificate to be issued.

8. For the convenience of security holders the Board of Directors may arrange for an agency in New York for the transfer of Stock and of Registered Bonds of the Company; proper records of such transfers to be kept at such agency, and to be open to the inspection of the Secretary.

Directors.

9. From and after the first annual meeting of the Stockholders the Board of Directors shall consist of nine members (of whom the President shall be one), who shall hold their office for one year, and until their successors are elected. Any vacancy in the Board may be filled by a majority of the Directors. A majority of the Board shall be a quorum for the transaction of business.

10. Regular meetings of the Board shall be held on the second Thursday of January, April, July and October, and special meetings of the Board may be called by order of the President or of the Executive Committee, or of a majority of the Board, and written notice

of each meeting, whether regular or special, shall be delivered
169 or mailed to each Director a reasonable time before the meeting. All such meetings shall be held either in Richmond, Knoxville, or in New York City.

11. The Directors elected at the annual meeting shall meet as soon as may be thereafter, and they shall elect a President, a First Vice-President, a Second Vice-President and a Third Vice-President of the Company, each to hold office for one year, or until the next election of the Directors, and until his successor is elected; and they shall also elect, to hold office during the pleasure of the Board, a General Counsel, a Secretary and Treasurer, and they may also elect or appoint an Auditor. The President shall be elected from among the members of the Board.

12. The order of business at all meetings of the Board, except adjourned meetings, shall be as follows:

1st. Reading the Minutes of the last meeting.
2nd. Correspondence.
3rd. Reports of Officers.
4th. Reports of Standing Committees.
5th. Reports of Special Committees.
6th. Unfinished Business.
7th. Original Resolutions and New Business.

13. In case a vacancy shall have occurred in the office of the President, First, Second or Third Vice-President, Secretary or Assistant Secretary, Treasurer or Assistant Treasurer, or Auditor, the Board of Directors shall fill the same as early as practicable, and until so filled the President, or in his absence the First, Second or Third Vice-President, in the order named, may make an appointment *pro tem.*, to fill the vacancy temporarily; or in case of temporary incapacity or absence of any officer, other than the President or First, Second or Third Vice-President, the President, or in his absence the First or Second Vice-President, in the order named, may make an appointment *pro tem.*, to act in place of the officer so temporarily incapacitated or absent, but such appointment shall be subject to change by the Board or Executive Committee at any regular or special meeting thereafter.

14. The compensation of all officers of the Company shall be fixed by the Board of Directors from time to time. Each Director shall be paid ten dollars for each meeting of the Board, and of any committee of which he is a member, at which he shall attend, in addition to transportation and other expenses actually incurred, at the rate of not exceeding four cents per mile to and from his place of residence to the place of meeting.

15. The Board of Directors shall make a report to the Stockholders at their annual meeting.

The Corporate Seal.

16. The Common Corporate Seal is, and until otherwise ordered by the Board of Directors shall be, an impression upon paper or wax of a circular device, such as that impressed upon the margin hereof,

being an ornamental center surrounded by the words *"Southern Railway Company, June, 1894,"* within, containing circumferential lines.

The Secretary of the Company shall procure, preserve and keep duplicate stamps suitable to make such impression of such corporate seal; and, when as directed by the special or general resolution of the Board of Directors or of the Executive Committee, the President, either of the three Vice-Presidents or the Secretary or Assistant Secretary, may and shall use one or the other of such duplicate stamps in impressing such corporate seal upon the documents, indentures and obligations of the Company.

President and Vice-Presidents.

17. The President shall preside at all meetings of the Stockholders and of the Directors. In his absence the First Vice-President, Second Vice-President or Third Vice-President, in the order named, shall preside. In the absence of the President and the First, Second and Third Vice-Presidents, the members present shall appoint one of their number to preside. The President shall have general charge, control and supervision of all the business and affairs of the Company, and over all its officers, agents and employees. Except when these By-Laws otherwise provide, or the Board shall otherwise direct, all officers and heads of departments of the Company shall be appointed by him and subject to removal by him.

18. The First Vice-President shall, during the absence or inability of the President, perform his duties. During the absence or inability of the President and First Vice-President the Second Vice-President shall perform his duties, and during the absence or inability of the President and First and Second Vice-Presidents the Third Vice-President shall perform his duties. The Vice-Presidents shall also perform such other duties as may from time to time be assigned to them respectively by the President or by the Board.

19. All deeds of conveyance of the Company's lands, and all other instruments required to be executed by the Company itself, under its corporate seal, shall be signed by the President (or First, Second or Third Vice-President) for and in the name of the Company, except in such cases as the Board of Directors shall otherwise order; and the seal of the Company shall be thereto affixed by the President (or First, Second or Third Vice-President) or by the Secretary or Assistant Secretary, and attested by the Secretary or Assistant Secretary, and the execution thereof shall be acknowledged by the President (or First, Second or Third Vice-President) or other person designated by the Board to execute the same, as the act and deed of the Company, in such manner and form as may be required by law.

Other Executive Officers.

20. The Board of Directors shall have power to elect or appoint any other officers or assistants, who shall perform such duties as may be assigned to them by the Board by general rules, or from time to time; and who shall hold their office during the pleasure of the Board.

Committees.

21. There shall be an Executive Committee, consisting of four members of the Board, of whom the President shall be one. Other Committees, standing or special, may be appointed with such duties and powers as shall be assigned to and given them by the Board. Meetings of the Executive Committee may be called by order of the President, or of a majority of said Committee to be held at such convenient place or places as he or they shall appoint, on written notice delivered or mailed to each member thereof a reasonable time before the meeting, and three members shall constitute a quorum.

In case of the anticipated absence of any member of the Executive Committee from any meeting of said Committee, or in case of inability of any member to attend such meeting, the President (or First, Second or Third Vice-President, in the order named, in his absence) may, at any time before such meeting is called to order, appoint a Director to serve during such absence or inability in place of the absent member or of the member unable to attend, but such appointment shall not extend to more than one member absent or unable to attend, and any member of the Committee present at any meeting may object to such appointee before the meeting is called to order, in which case the appointment shall be void and of no effect. No Vice-President shall be a member of the Executive Committee.

22. The Executive Committee, when the Board is not in session, shall have and may exercise, but only by the unanimous vote of all the members present at a meeting, all the powers of the Board of Directors; and they shall cause to be kept a full and accurate record of all the actions and proceedings, and report the same from time to time to the Board.

23. The said Committee shall have charge of all questions of finance, accounts and claims. It shall be the duty of this Committee, from time to time, at their discretion, and whenever directed by the Board, to audit and pass upon the accounts of the Treasurer, and to examine the transfer books of the Company; they shall report to the Board at every regular meeting, and at any special meeting, as occasion shall require.

24. All reports of Committees, standing or special, shall be made to the Board in writing, signed by the Chairman or by the member designated by the Committee to make the report.

25. All Committees shall be appointed by the President, unless it be otherwise directed by the Board. A majority of the members of all Committees shall be a quorum, except as limited in article twenty-one.

172 The General Counsel.

26. The General Counsel, subject to the President and the Board of Directors, shall have general charge and supervision of the legal business of the Company.

The Secretary.

27. It shall be the duty of the Secretary to attend all meetings of the Board of Directors and of the Stockholders, and of the Executive Committee, and record the minutes of their proceedings in suitable books to be provided for that purpose, and of which he shall be the custodian. He shall give due and timely notice to the Directors of all regular and special meetings of the Board, and of meetings of Committees to the members thereof. He shall take charge of all reports, resolutions and papers, after they shall be acted upon or submitted to the Board, and also of all letters and papers pertaining to the general business of the Company, except the official bonds. He shall be the custodian of the seal of the Company, and it shall be his duty to affix the same to all such proper instruments as the Board or the President, or either Vice-President, may direct, or to allow the President or either Vice-President so to affix it. The Directors may, if they think proper, appoint an Assistant Secretary, who shall have his office in Richmond, and perform or assist in the performance of such of the above duties as they may prescribe.

28. The Stock Books shall be kept by the Secretary, and he shall also keep transfer books, on which he shall register all transfers of stock and of registered bonds, and the names and addresses of all the transferees, unless the Board of Directors should arrange for a transfer agency in New York, in which case the said stock books and other books in this section provided for shall be kept there, subject to the supervision of the Secretary.

The Treasurer.

29. The Treasurer shall have his office in Richmond. It shall be his duty, either in person or through competent and faithful assistants, cashiers or disbursing officers, to receive and disburse, under the direction of the Board, all moneys belonging or coming to the Company; to keep regular, full and true accounts of all receipts and disbursements, and to make detailed reports of the same to the Board of Directors at the regular meetings and at all other times when required.

30. The moneys and securities of the Company shall be kept in such bank or banks, or other depository or depositories, as the Executive Committee or the Board may from time to time direct.

31. No payment shall be made except upon a sufficient voucher duly certified or approved by the proper officer.

32. The Treasurer and all other officers and agents who shall receive or disburse moneys, or have custody of moneys or securities, shall give bonds, with sureties approved by the Board or by the Executive Committee, for the faithful discharge of their duties, and for the safe keeping and due delivery of the moneys, securities and other property of the Company committed to them or that shall come to their hands.

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33. The Directors may, if they think proper, appoint an Assistant Treasurer, who shall have his office at such place as they may direct,

and perform or assist in the performance of such of the above duties as they may prescribe.

Auditor.

34. The Auditor shall have direct charge of the general books and accounts of the Company; and it shall be his duty and he shall have power to enforce the system prescribed for keeping the same. He shall, on approval of the President or in his absence, of either of the three Vice-Presidents, prescribe the form of all payrolls, vouchers, accounts, reports and returns of every description required in his department, and also the time at which the same shall be rendered. It shall be his duty to examine the accounts of all officers and employees and to see that the proper returns are made of all receipts from traffic and other sources, and that correct vouchers are turned over to him for all disbursements for any purpose. There shall be returned to the Auditor, at such time in every month as he may prescribe, all bills and payrolls for the previous month, properly certified and made in detail. The Auditor shall approve and audit the same if found correct in every particular. But he shall not approve or audit any voucher or payroll unless it has been previously certified to by the head of the department in which it originated; and this approval will not be held to relieve him from the duty of exercising due caution and diligence in satisfying himself that the voucher or payroll is correct and duly authorized. And in case of doubt it shall be his duty to refer it back to the officer certifying the same; and if the information furnished is not satisfactory, he shall refer it to the President, or, in his absence to either Vice-President. He shall also be the custodian of all bonds of officials and agents of the company handling funds. The Auditor shall have the right to appoint and remove all necessary assistants or clerks in his department, subject to the approval of the President, or in his absence, of either Vice-President, and he shall be held responsible for the proper performance of their duties.

Amendments.

35. These By-Laws may be altered, amended, added to or repealed at any regular meeting of the Board of Directors by a vote of two-thirds of all Directors present, provided such two-thirds constitute a majority of all the Directors of the Company, and provided written or printed notice of the proposed alteration, amendment, addition or repeal shall have been given at a previous regular meeting or they may be altered, amended or added to or repealed, in like manner at any regular or special meeting, of which written or printed notice, stating the object of the meeting as above shall have been given or sent to each Director at least ten days previous to the time appointed for such special meeting; or they may be amended at any annual or general meeting of the stockholders by a vote of a majority in amount of all the shares.

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"SCHEDULE D."

AN ACT

AUTHORIZING THE PURCHASERS OF THE RICHMOND AND DANVILLE RAILROAD, THEIR ASSIGNS AND SUCCESSORS, TO BECOME AND BE A CORPORATION, TO ADOPT A NAME THEREFOR, AND TO POSSESS AND EXERCISE GENERAL POWERS; AND AUTHORIZING THE LEASING TO OR BY, AND THE CONSOLIDATION THEREWITH OF, OTHER CORPORATIONS.

[Approved February 20, 1894.]

Whereas, a certain suit in equity is now pending in the Circuit Court of the United States of America for the Eastern District of Virginia, wherein the Central Trust Company of New York is complainant, and the Richmond and Danville Railroad Company, a corporation created by and existing under the Laws of the State of Virginia, is defendant, in which suit it is sought to foreclose the consolidated mortgage, dated the twenty-second day of October, in the year one thousand eight hundred and eighty-six, and upon or about that day duly executed, acknowledged and delivered by said railroad corporation to said Central Trust Company of New York, and subsequently supplemented and confirmed by said railroad corporation by instruments dated November first, eighteen hundred and eighty-six, and April thirtieth, eighteen hundred and eighty-eight, respectively, in which suit also it is proposed to sell the whole of the mortgaged property and premises, being the rights, property, privileges and franchises of the said the Richmond and Danville Railroad Company;

And, whereas, it is deemed desirable and for the interest of this Commonwealth that the said railroad property shall be sold and reorganized in such manner and under such conditions as to secure the largest and best possible facilities and advantages of transportation and communication for the people of this State; now, therefore,

1. *Be it enacted by the General Assembly of Virginia,* that the purchaser or purchasers of the said mortgaged premises of the said the Richmond and Danville Railroad Company at the foreclosure sale thereof in the course of the said suit in equity, and such person or persons as he or they may associate with himself or themselves, shall forthwith be, and they hereby are, constituted a body politic and corporate by the name which they may select, as set forth in the conveyance of said mortgaged premises, or in any writing signed by him or them and recorded in the court in which
175 the said conveyance shall be recorded, and such new corporation shall have, possess and be invested with all the estate, right, title and interest in and to such railroad and other property, with their appurtenances, and all the franchises, rights and privileges had and possessed by the said Richmond and Danville Railroad Company to the same extent as a purchaser under sections twelve hundred and thirty-

three and twelve hundred and thirty-four of the Code of Virginia, and shall perform all the duties prescribed by said sections of said Code; provided, however, that said new corporation shall not be limited as to the amount or classification of its stock or bonds, except that the total amount of stock issued shall not exceed three hundred and fifty million dollars, and shall have no immunity from any lawful State, county or municipal taxation by reason of its former charter or any law heretofore exempting it from taxation.

2. Such purchaser or purchasers may associate with him or them any number of persons in the organization of the new corporation, which may create and issue its stock and its bonds secured by mortgage or otherwise, according to any plan adopted by such purchaser or purchasers, and filed as hereinafter provided.

3. It shall be the duty of such new corporation within six months after the conveyance to it of said mortgaged premises to execute a certificate in writing under its common seal attested by the signature of its President or Vice-President, referring to the sale and conveyance by which it shall have acquired title to such premises and the plan of organization adopted by the purchasers, the amount and classes or kinds of capital stock and mortgage bonds or other obligations authorized to be issued, and also specifying the name of such new corporation and of its President, and the number and names of its Directors, which certificate shall be filed in the office of the Secretary of the Commonwealth of Virginia, and a certified copy thereof shall be conclusive evidence of the existence of such new corporation.

4. In addition to its other powers, such new corporation shall have, and from time to time as occasion arises may exercise, the following powers, or any of them, namely:

(*a*) With the approval of a majority of its stockholders, given at a meeting, it may, from time to time, lease, use, operate, consolidate with, or purchase or otherwise acquire, or be leased, used, operated by, or consolidated with, any railroad or transportation company now or hereafter incorporated by the laws of the United States, or of any of the States thereof, or any one or more of such railroad or transportation companies, or any other railroad or transportation company or companies which now are or hereafter may be leased, or used, or operated by, or consolidated with any one or more of such railroad or transportation companies; and, from time to time, it may consolidate its capital stock, property and franchises, by change of name or otherwise, with the capital stock, property and franchises of any other railroad or transportation company, power being hereby granted to any railroad or transportation company or companies incorporated by or under any act or acts of the General Assembly of the State of Virginia, with the approval of a majority in amount of its or their shareholders respectively
176 given at a meeting, to make and carry out such contracts of consolidation or lease, sale or other method of acquisition; *provided* that, in all consolidations, a copy of the agreement therefor shall be filed in the office of the Secretary of the Commonwealth of Virginia, and that any corporation

with which said new corporation may consolidate, or which it may lease, shall be or remain subject to the jurisdiction of the courts of this State, and all lines of railroad operated by it in the State of Virginia shall be subject to the general laws of the State; and *provided, further,* that any stockholder who dissents from any such consolidation may within sixty days thereafter apply by petition to the Circuit Court of the City of Richmond to determine the value of his stock, and shall be entitled to receive from the new corporation the value as thus determined of such stock upon transfer thereof to the new corporation.

(*b*) It may from time to time purchase, own and hold bonds or other evidences of debt, and shares of the capital stock of any railroad company or companies formed under the laws of this or any other State, and from time to time may guarantee or assume the bonds, evidences of indebtedness or capital stock of any such railroad company.

(*c*) It may from time to time acquire or guarantee the stocks and bonds, or either, of any inland, coast or ocean transportation company or companies, operating to or from any point or points on its lines; and it may develop or aid in the development of its business by acquiring or guaranteeing the stocks and bonds, or either, of hotel, lighterage, wharf, elevating and other such enterprises convenient in connection therewith or as part thereof.

5. Said new corporation may issue its capital stock of one or more classes or kinds, and in one or more series or grades, with such preferences, conditions and voting power as shall be provided in said plan of organization, and from time to time it may increase or decrease the amount of any class or kind or grade of such stock as shall be provided in said plan of reorganization, or with the approval of a majority in amount of the stockholders, given at a meeting of stockholders called for that purpose, unless and except as otherwise expressly provided in certificates representing stock previously issued. The shares of each class of stock shall be of such par amount, and shall entitle the holders to such vote respectively as shall be determined in the said plan of reorganization or by the stockholders in like manner.

6. Such new corporation may borrow money and issue bonds or other evidence of indebtedness therefor, and may secure the same, from time to time, by mortgage or deed of trust upon any or all of its property and franchises, and such new corporation, from time to time, may issue and sell its bonds and its capital stock at such prices and on such terms as shall be specified in said plan of organization, or as a majority in amount of the stockholders shall approve at any meeting, and may receive in payment therefor property, securities or shares in any corporation mentioned in this act, and any stock so issued shall be deemed fully paid and free from any liability.

177 7. The business, property and concerns of said corporation shall be managed by a Board of Directors consisting of not less than five members, and one of their number shall be chosen as President. The stockholders may adopt by-laws for the government of the stock, property and concerns of the corporation, and for the regulation

of its directors, officers and agents, and in and by such by-laws the stockholders may prescribe how such by-laws may be amended or repealed; provided, however, that until such by-laws shall be adopted by the stockholders the corporation shall be governed by by-laws adopted in accordance with the plan of organization.

8. The principal office of the Company shall be in the City of Richmond, in this State, at which all meetings of the stockholders shall be held; and all other offices and workshops of said Company shall be located in the State of Virginia, as far as the same may be practicable.

9. It shall be lawful for the Circuit Court of the City of Richmond, upon the petition of the President and Board of Directors, at any time to order a change in the name of the Company; but any such change of name shall be without prejudice to the rights of any creditor, or to the exercise of any of the powers and privileges granted by this act.

10. There shall be paid to the Clerk of the county or corporation in which any mortgage authorized by this act may be presented for recordation, the existing rate of taxation for such recordation upon the assessed value of the road-beds, depots, station buildings and lots, and machine shops, fixtures and rolling stock, and any real estate not included in said enumeration, in the State of Virginia, conveyed in such mortgage; and upon presentation to the Clerk of the county or corporation where it is proposed to record said mortgage of a certificate of the Auditor of the State of the amount of the assessed values of the said property within the State of Virginia, and upon the payment of the tax thereon to the said Clerk, the said mortgage shall be recorded without other charge than the clerical fees provided in such cases. Certified copies of such mortgage may be recorded in any county of Virginia in which property covered by such mortgage may be located upon payment of clerical fees.

11. All taxes and debts due or to become due the State of Virginia by the corporation shall be paid in lawful money of the United States and not in coupons.

12. This act shall be in force from its passage.

February 28, 1894.

178 (A Copy.)

(Signed) J. BELL BIGGER,
Clerk of the House of Delegates and
Keeper of the Rolls of Virginia.

COMMONWEALTH OF VIRGINIA:

I, Chas. T. O'Ferrall, Governor of the Commonwealth of Virginia, certify that J. Bell Bigger, whose name is signed to the within copy of an Act of Assembly bearing date the 28th day of February, 1894, is and was at the time of signing Clerk of the House of Delegates and Keeper of the Rolls of Virginia, duly elected and qualified; that he is authorized by the laws of this State to make and sign such copy of an act, and that to all his official acts full faith, credit and authority are due and ought to be given.

In testimony whereof, I have hereunto set my hand as Governor, and caused the Great Seal of the State to be affixed. Done at the City of Richmond this 28th day of February, A. D. 1894, and in the one hundred and eighteenth year of the Commonwealth.

[GREAT SEAL OF VIRGINIA.]

(Signed) CHAS. T. O'FERRALL.

By the Governor:
(Signed) J. T. LAWLESS,
Secretary of the Comonwealth and Keeper of the Seals.

OFFICE OF THE SECRETARY OF THE COMMONWEALTH AND KEEPER OF THE SEALS OF VIRGINIA.

RICHMOND, VIRGINIA,

COMMONWEALTH OF VIRGINIA:

I, , Secretary of the Commonwealth of Virginia, certify that the foregoing is a true copy of the certificate of the Southern Railway Company, a corporation created by and existing under an Act of Assembly of the State of Virginia, approved February 20, 1894, as mentioned in Section 3 of said Act, which certificate was duly filed in my said office on the 14th day of December, 1894.

Given under my hand and the lesser seal of the Commonwealth, at Richmond, this day of , A. D.

[SEAL.]

——— ———,
Secretary of the Commonwealth and Keeper of the Seals of Virginia.

179 AN ACT

TO PROVIDE FOR THE REDUCTION OF THE CAPITAL STOCK AND THE ISSUE OF SPECIAL STOCK OF THE SOUTHERN RAILWAY COMPANY.

Approved January 23, 1900.

Whereas, pursuant to the provisions of the Act of Assembly of the Commonwealth of Virginia, approved February twentieth, eighteen hundred and ninety-four, the purchasers of the Richmond and Danville Railroad did constitute themselves a body politic and corporate by the name of

Southern Railway Company;

and also as provided by said Act, within six months after making their purchase did adopt and did file in the office of the Secretary of the Commonwealth their certain plan of organization dated December fourth, eighteen hundred and ninety-four, whereby, among other things, they did certify that the said purchasers and the Southern Railway Company had fixed the capital stock of the corporation at one hundred and eighty million dollars, divided into one million eight hundred thousand shares, each of the par value of one hun-

dred dollars, of which six hundred thousand shares are preferred stock and the remainder are common stock, the corporation reserving the right to increase such capital stock up to, but not exceeding the limit authorized by the said act, approved February twentieth, eighteen hundred and ninety-four, and the right to increase or to decrease the amount of any class or kind or grade of its capital stock, and also to redeem and to purchase at par any and all preferred stock, or any kind, class or grade thereof; and further did certify that with the exception of one thousand shares of common stock theretofore issued or reserved to qualify Directors, or for other purposes, all of the stock of the Company had been duly issued and delivered to J. Pierpont Morgan, Charles Lanier and George F. Baker, and their successors, as Voting Trustees, under an agreement dated October fifteenth, eighteen hundred and ninety-four, with the exclusive right and privilege in said Voting Trustees, during the continuance of their trust as provided in said agreement, to vote upon and in respect of, all stock so issued to them, and also to collect and receive all dividends declared in respect of such stock, and to distribute any such dividends among the holders of their stock trust certificates, which holders in due course would be entitled to receive in exchange therefor certificates for corresponding amounts and kinds of the capital stock of the Southern Railway Company; and

Whereas, from time to time, the said corporation has issued stock certificates for the full amount of one million eight hundred thousand shares, each of the par value of one hundred dollars of which six hundred thousand shares are preferred stock, and one million two hundred thousand shares are common stock, all of which stock certificates (excepting those for such one thousand shares of common stock) have been duly issued to, and now are held by, the said Voting Trustees under the said Voting Trust Agreement dated October fifteenth, eighteen hundred and ninety-four; and

Whereas, in and by Section five of the said Act, approved February twentieth, eighteen hundred and ninety-four, it was provided that the said new company might issue its capital stock of one or more class or kinds and in one or more series or grades, with such preferences, conditions, and voting power as should be provided in said plan of organization; and from time to time might increase or decrease the amount of any class or kind or grade of such stock as should be provided in the plan of organization, or with the approval of a majority in amount of the stockholders given at a meeting of the stockholders called for that purpose, unless and except as otherwise expressly provided in certificates representing stock previously issued; and that the shares of each class of stock should be of such par amount, and should entitle the holders to such vote, respectively, as should be determined by said plan of organization, or by the stockholders in like manner; and

Whereas, no express provision concerning any increase or decrease of the common capital stock is contained in any outstanding certificate representing common stock, and it is deemed desirable for the interests of the Company and of the Commonwealth that the

nominal value of such common stock shall be reduced so as to conform more nearly to the market value thereof; *now, therefore,*

1. *Be it enacted by the General Assembly of Virginia:* That in the manner hereinafter provided, with the consent of holders of a majority of all outstanding stock of the Southern Railway Company, including at least a majority of outstanding common stock, the Board of Directors of the Company, from time to time in reduction of the amount of its stock, may issue one share of a new or special stock as hereinafter described, in lieu and instead of the issue of two shares of the stock authorized by said Act approved February twentieth, eighteen hundred and ninety-four, but not heretofore issued, or in exchange for every two shares of the common stock now outstanding that may be surrendered for that purpose and cancelled. The company may agree to pay a dividend or other cash sum in connection with such exchanges of outstanding common stock; the amount of such dividend or other cash sum to be fixed by the Board of Directors, and payment thereof to be made at such time and in such manner as in its discretion the board may determine. The consent hereunder of stockholders may be given either in writing or by vote at a meeting or by a combination of consents in writing or by vote.

2. Holders of stock trust certificates may authorize the Voting Trustees as holders of the corresponding amount of stock to consent to such reduction, and may confer any other authority upon the Voting Trustees by presentation of such certificates to the Voting Trustees, in order that a notation of such authority may be
181 stamped thereon. Such stamp on any stock trust certificate shall be conclusive proof that the holder thereof has given such authority, which shall bind all transferees of such certificate and of any interest thereby represented, and shall be irrevocable. In exchange for stock trust certificates stamped as aforesaid there shall be issued stock trust certificates either in the present form similarly stamped, or in a new form adapted to the conditions as altered under this Act.

3. If and when the holders of a majority of the outstanding stock, including such amount of the outstanding common stock (not less than a majority thereof) as shall be satisfactory to the Board of Directors, shall have consented to the reduction herein authorized, the company from time to time within such period or periods as shall be prescribed or extended by the Board of Directors, shall issue new certificate for one share (of the par value of one hundred dollars) of the special stock authorized by this Act in exchange for every two shares of outstanding common stock surrendered for that purpose; and as hereinbefore authorized, thereupon shall make payment of such dividend or other cash sum, if any, as it may have agreed to pay.

4. All such special stock, whether issued as herein permitted in lieu of authorized common stock, or in exchange for outstanding common stock, shall be distinguished by printing on or in the certificates to be issued therefor, a statement that such stock was issued under the provisions of this Act. Until more than ninety-five per

centum of the common stock then outstanding shall have been exchanged as herein permitted, and thereafter until otherwise determined by the Board of Directors, each share of such special stock shall entitle the holder thereof to receive the same dividends as though he were the holder of two shares of present common stock theretofore converted into such one share of special stock.

5. From time to time, in exchange for such amount of special stock as under this Act shall be issuable therefor the Voting Trustees may surrender to the company certificates for present common stock to the amount which by stamping or otherwise shall have been authorized by the holders of common stock trust certificates; and at the termination of the voting trust the holders of such stamped common stock trust certificates shall receive from the Voting Trustees, in lieu of the common stock so surrendered to the company and mentioned in such trust certificates special stock to the extent of one-half of such amount of such common stock. Any dividend or other cash sum that may be received by the Voting Trustees in connection with such exchanges of common stock shall be payable by them to the holders of the stamped common stock trust certificates at such time or times as the Voting Trustees may determine. After the termination of the voting trust, the Voting Trustees and the Board of Directors, upon such terms as they may deem expedient may make arrangements for the issue of special stock in redemption of unstamped common stock trust certificates then outstanding.

6. Nothing in this Act contained shall impair the existing and continuing right of the Southern Railway Company to in-
182 crease or to decrease its capital stock of any class or grade, whether preferred, special or common, under and in accordance with said Act of Assembly, approved February twentieth, eighteen hundred and ninety-four. With the approval of the holders of a majority of the capital stock, given at a meeting of the stockholders called for that purpose after the termination of the voting trust, the company may decrease the amount of its common stock to one-half the amount thereof by reducing the number of shares of common stock of one hundred dollars each then held by each stockholder to one-half of such number.

7. This Act shall be in force from its passage.

A true Copy.

Teste:

____ ____,

Clerk of the House of Delegates and
Keeper of the Rolls of Virginia.

Date

AN ACT

TO AMEND AND RE-ENACT SECTION 7 OF AN ACT APPROVED FEBRUARY 20, 1894, ENTITLED "AN ACT AUTHORIZING THE PURCHASERS OF THE RICHMOND AND DANVILLE RAILROAD, THEIR ASSIGNS AND SUCCESSORS, TO BECOME AND BE A CORPORATION, TO ADOPT A NAME THEREFOR, AND TO POSSESS AND EXERCISE GENERAL POWERS; AND AUTHORIZING THE LEASING TO OR BY, AND THE CONSOLIDATION THEREWITH OF, OTHER CORPORATIONS."

Approved February 26, 1902.

1. *Be it enacted by the General Assembly of Virginia:* That Section Seven of an Act, approved February twentieth, eighteen hundred and ninety-four, entitled "An Act authorizing the purchasers of the Richmond and Danville Railroad, their assigns and successors, to become and be a corporation, to adopt a name therefor, and to possess and exercise general powers; and authorizing the leasing to or by, and the consolidation therewith of, other corporations," be and hereby is amended and re-enacted to read as follows:

§ 7. The business, property and concerns of said corporation shall be managed by a Board of Directors consisting of not less than five nor more than fifteen members, and one of their number shall be chosen as President. The corporation, at a general meeting or at an annual meeting, may from time to time increase or decrease, within the limits hereinbefore fixed, the number of Directors to be elected at the next annual meeting, but in case of such increase or decrease, the number to be elected shall be specified in the notice of the meeting at which the election is to be held. By the vote of a majority of the stockholders present or represented at any general meeting or at any annual meeting, the corporation may
183 classify its Directors into three classes, as nearly as may be equal in numbers. In case such classification is made, the term of office of the Directors of the first class shall expire in one year, of the Directors of the second class in two years, of the Directors of the third class in three years, from the annual meeting at which the first Directors so classified are chosen under this Act and at each annual meeting thereafter, the Directors then to be elected shall be elected for three years. Every Director shall continue in office until the expiration of the term for which he was elected, and until his successor shall have been elected and shall have accepted his office.

All vacancies shall be filled and all Directors for whose election provision is not otherwise made in this Act, shall be elected in accordance with the by-laws. The stockholders may adopt by-laws for the government of the stock, property and concerns of the corporation, and for the regulation of its Directors, officers and agents, and in and by such by-laws the stockholders may prescribe how such by-laws may be amended and repealed, provided, however, that until otherwise voted by the stockholders, the corporation shall be governed by the by-laws of the Southern Railway Company, adopted

in accordance with the plan of organization of the Southern Railway Company filed in the office of the Secretary of the Commonwealth, dated December the fourth, eighteen hundred and ninety-four.

2. All acts and parts of acts inconsistent herewith are hereby repealed.

3. This Act shall be in force from its passage.

A true Copy.

Teste:

____ ____,

Clerk of the House of Delegates and Keeper of the Rolls of Virginia.

Date

COMMONWEALTH OF VIRGINIA:

I, , Governor of the Commonwealth of Virginia, certify that , whose name is signed to the within copies of Acts of Assembly of Virginia, approved, respectively, February 20, 1894, January 23, 1900, and February 26, 1902, bearing date the day of , , is, and was, at the time of such signing, Clerk of the House of Delegates and Keeper of the Rolls of Virginia, duly elected and qualified; that he is authorized by the laws of this State to make and sign such copies of Acts of Assembly of Virginia; that such attestation is in due form and by the proper officer, and that to all his official acts full faith, credit and authority are due and ought to be given.

And I further certify that whose name is signed to the within attestation of the Certificate of Southern Railway Company mentioned in Section 3, of the Act of Assembly 184 of Virginia, approved February 20, 1894, bearing date the day of , is and was, at the time of such signing, Secretary of the Commonwealth of Virginia, duly elected and qualified; that he is the keeper of the records in which said certificate is recorded, and that he is authorized by the laws of this State to make and sign such attestation; that such attestation is in due form and by the proper officer, and that to all his official acts full faith, credit and authority are due and ought to be given.

In testimony whereof, I have hereunto set my hand as Governor, and caused the Great Seal of the Commonwealth to be affixed.

Done at the City of Richmond, this day of , in the year of our Lord , and in the year of the Commonwealth.

BY THE GOVERNOR:

____ ____,

Secretary of the Commonwealth and Keeper of the Seals

EXHIBIT No. 2.

[House Bill 640—Senate Bill 25.]

AN ACT TO PROVIDE FOR THE ASSESSMENT OF REAL ESTATE OF RAILROAD COMPANIES IN THE STOCK-LAW TERRITORY FOR LOCAL BENEFIT.

The General Assembly of North Carolina do enact:

SECTION 1. That the North Carolina Corporation Commission shall assess the value of real estate belonging to any railroad company within stock-law territory in this State at the same time that they assess railroad property for general purposes.

SEC. 2. That every railroad company shall report to the Corporation Commission on blanks to be furnished by them, mileage of such railroad within the stock-law territory, width of right-of-way, weight of rails, value of rails and ties, number, description, and value of all structures within the stock-law territory, and all other information necessary to enable the Corporation Commission to ascertain the value of said real estate. That after assessment shall be made it shall not be changed until the year for the assessment of real property for general tax purposes, except that the Corporation Commission shall correct any assessment of real property on which any structure over one hundred dollars ($100) in value may have been erected, or on which any structure of like value may have been destroyed, as the value of said real estate may be affected thereby.

SEC. 3. This act shall be in force from and after its ratification.

SEC. 4. All laws in conflict with this act are hereby repealed.

In the General Assembly read three times, and ratified this the 8th day of March, A. D. 1907.

185 EXHIBIT No. 3.

[House Bill 1484—Senate Bill 1242.]

AN ACT TO PRESCRIBE THE HOURS OF SERVICE OF EMPLOYEES OF RAILROAD COMPANIES ENGAGED IN THE OPERATION OF TRAINS.

The General Assembly of North Carolina do enact:

SECTION 1. That it shall be unlawful for any railroad company doing business in the State of North Carolina, or for any officer, agent or employee thereof who has the direction of or control over any employee or agent of the classes mentioned below, to cause or knowingly permit or allow any employee belonging to any such class to render any service for such railroad company pertaining to the movement of trains, for a greater number of hours in any twenty-four hours than is hereinafter specified, to-wit:

(*a*) Any employee doing the work of a train dispatcher (or telegraph operator), having in charge in any degree the direction of the movement of any train or trains in North Carolina, for more than eight hours in any twenty-four hours: *Provided,* the Corporation Commission of North Carolina is hereby authorized to permit any such telegraph operator at any station on any road in this State to work for a longer time, not exceeding twelve hours in any twenty-four hours, where the said Corporation Commission shall determine that the safety of the traveling public will not be endangered by such extension of hours.

(*b*) Any conductor, flagman, engineer, brakeman, fireman or other member of any train crew, for more than sixteen hours in any twenty-four hours.

SEC. 2. That any railroad company, or officer or agent thereof, having the direction of or control over any employee mentioned in section one of this act, who shall violate any of the provisions hereof, shall be guilty of a misdemeanor, and upon conviction such railroad company shall be fined not less than five hundred dollars; and such officer or agent shall be fined or imprisoned, or both, in the discretion of the Court.

SEC. 3. That any train dispatcher or telegraph operator, having in charge in any degree the direction of the movement of any train or trains in North Carolina, who shall work more than eight hours in any twenty-four hours as an employee performing the duties aforesaid, except as shall be permitted by the Corporation Commission under the provisions of this act, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, in the discretion of the Court.

SEC. 4. Any conductor, flagman, fireman, engineer, brakeman, or other member of any train crew, who shall work for any railroad company more than sixteen hours in any twenty-four hours, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the Court: *Provided,*
that it shall not be held a violation of this act by any con-
186 ductor, brakeman, flagman, engineer, fireman or other member of any train crew who shall work more than sixteen hours in any twenty-four hours in order to clear the track or tracks of said railroad company from wrecks, washouts, or obstruction caused by the act of God, so that they may bring the train or trains operated by them to a station on said road, which station shall be either the schedule destination of said train or the station at which there is regularly a change of train crews; nor shall it be held a violation of this act by the corporation, officers or agents thereof, to permit the said conductor, flagman, brakeman, fireman, engineer or other member of a train crew to work overtime under the circumstances and conditions hereinbefore stated.

SEC. 5. This act shall be in force from and after its ratification.

In the General Assembly read three times, and ratified this the 8th day of March, A. D. 1907.

EXHIBIT No. 4.

[House Bill 1052—Senate Bill 1243.]

AN ACT TO AUTHORIZE THE CORPORATION COMMISSION TO REQUIRE RAILROADS TO ERECT AND MAINTAIN UNION DEPOTS IN TOWNS OF TWO THOUSAND INHABITANTS.

The General Assembly of North Carolina do enact:

SECTION 1. Wherever two or more railroads now, or hereafter may, maintain freight depots and a union passenger depot within one mile of a town of two thousand population for the convenience of the inhabitants thereof, and do not enter the corporate limits of the said town, it shall be the duty of the Corporation Commission, upon the petition of a majority of the qualified voters of the said town, which petition shall be properly sworn to by the signers thereof, to require and compel, where practicable, the said railroads to run their lines into or through the corporate limits of the said town, and construct, equip, and maintain suitable passenger and freight depots at some convenient place or places therein, and the passenger depot shall be a union station and be built and maintained by the several railroads according to a plan and in such a manner as shall be approved by the Corporation Commission.

SEC. 2. Whenever a petition shall be filed with the Corporation Commission as aforesaid, the said Corporation Commission shall set a day for the hearing thereof, which day shall be not more than twenty days from the filing of said petition, and shall immediately cause a notice to issue to the railroads interested in the matter set out in the petition, and after the hearing of the matter on the day named in the said notice, the said Commission, if a majority of its members shall deem it practicable, shall thereupon cause an
187 order to be made requiring the said railroads to build, equip, and maintain in a suitable manner, road-beds, yards, and depots, and any other necessary buildings or equipment, at convenient places within the limits of said town, as to a majority of them shall seem proper for the needs and growth of the business and inhabitants of the said town.

SEC. 3. The said order of the Corporation Commission to the said railroads shall name a time within which all the necessary work of entering the said town and construction of depots and other buildings shall be completed and opened to the public for the transaction of business, and the said railroads, for every day beyond the said time that they shall not be in operation according to the said order, shall pay the sum of fifty dollars for each and every day for such failure and neglect, to the Board of Commissioners or Aldermen of said town, which shall be for the benefit of the said town, this amount to be recovered as in other actions.

SEC. 4. This act shall also apply to any railroad that may hereafter enter into or run within one mile of the corporate limits of said town, and the Corporation Commission shall have the power to

require such railroads to unite with the other railroads in maintaining the depots, tracks, and other structures, and also pay such part of the cost thereof as to the said Corporation Commission may seem proper.

SEC. 5. The said railroads shall have the power to condemn such quantity of lands, including gardens, yards, residences and the premises pertaining thereto, as shall be necessary for the purposes of this act, the condemnation proceedings to be had in the same manner as now provided by the Revisal of one thousand nine hundred and five and amendments thereto.

SEC. 6. This act shall be in force and effect from and after its ratification.

In the General Assembly read three times, and ratified this the 11th day of March, A. D. 1907.

EXHIBIT No. 5.

[House Bill 2153—Senate Bill 256.]

AN ACT TO EXTEND AND ENLARGE THE POWERS OF THE NORTH CAROLINA CORPORATION COMMISSION.

The General Assembly of North Carolina do enact:

SECTION 1. That in addition to the powers already conferred upon and possessed by the North Carolina Corporation Commission it shall have power:

(*a*) To make any necessary and proper rules, orders and regulations for the safety, comfort and convenience of passengers, shippers or patrons of any public service corporation, and to require the observance of the same by the company and its employees.

188 (*b*) To require any railroad company to install and put in operation and maintain upon the whole or any part of its road a block system of telegraphy or any other reasonable safety device, but no railroad company shall be required to install a block system upon any part of its road upon which is not operated as many as or more than eight trains each way per day.

(*c*) To require the raising or lowering of any track or highway at any highway crossing and to designate who shall pay for the same, and when they think proper, partition the cost of abolishing grade crossings and the raising or lowering of said track or highway among the railroads and municipalities interested.

SEC. 2. That section one thousand and sixty-six of the Revisal of one thousand nine hundred and five be amended by adding thereto the following: "and to require all transportation and transmission companies to establish and maintain all such public service facilities and conveniences as may be reasonable and just."

SEC. 3. That section one thousand and ninety-seven of the Revisal of one thousand nine hundred and five be amended by adding thereto subsections six and seven and eight, as follows:

(6) To require when practicable and when the necessities of the traveling public, in the judgment of the Corporation Commission,

demand, that any railroad in this State shall install and operate one or more passenger or freight trains over its road, and also require any two or more railroads having intersecting points to make close connection at such points: *Provided*, that no order under this act shall be made unless the business of the railroad justifies it.

(7) From time to time to carefully examine into and inspect the condition of each railroad, its equipment and facilities, in regard to the public's safety and convenience; and if any are found by them to be unsafe, they shall at once notify and require the railroad company to put the same in repair.

(8) That all powers and duties in every respect conferred by law upon the Corporation Commission with respect to railroads and other transportation companies are hereby conferred upon said Corporation Commission to control and regulate telegraph, telephone and all other companies engaged in transmission of messages, in so far as they apply.

SEC. 4. That section one thousand and ninety-six of [the Revisal of] one thousand nine hundred and five be amended by inserting after the word "transmission" the words "and delivery," and by inserting after the word "telegraph" the word "company"; and by striking out the remaining part of said section and inserting in lieu thereof the following: "and to make just and reasonable rates of charges for the rental of telephones and furnishing telephonic communication by any telephone company or corporation."

SEC. 5. That section one thousand one hundred and ten be amended by inserting after the word "person," in the first line thereof, the words "or community," and by inserting after the word "discrimination," in the second line thereof, the words "or unjust or unreasonable rate," and by adding to said section the following: "The Corporation Commission shall have authority
189 to employ counsel whenever and for such periods of time as in their judgment it is necessary to do so, and counsel so employed shall be paid such fee and compensation as may be agreed upon by them."

SEC. 6. All persons and corporations affected by this act shall have the same right of appeal from the action of the Corporation Commission under the powers contained in this act as are now provided by law.

SEC. 7. That subsection nine of section two thousand five hundred and sixty-seven of the Revisal of one thousand nine hundred and five be and is hereby repealed.

SEC. 8. That this act shall be in force from and after its ratification.

In the General Assembly read three times, and ratified this the 11th day of March, A. D. 1907.

3. That in pursuance of the prayer of the said bill, on or about the 8th day of May, in the year 1907, a writ of subpœna was issued out of this Honorable Court and was duly served upon the said defendants Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, Robert D. Gilmer, and Hayden Clement, the first three con-

stituting the Corporation Commission of North Carolina, and the others being respectively the Attorney General and Assistant Attorney General of said state, and at the same time this Honorable court issued a temporary restraining order, in the words and figures as follows, to-wit:

Restraining Order.

In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
v.
FRANKLIN MCNEILL ET AL., Defendants.

Upon reading the verified bill in this cause, and upon its being made to appear to the Court that there is danger of irreparable injury to the complainant from delay, unless the acts sought to be enjoined herein are restrained until a hearing upon the motion for an injunction in this cause, it is now ordered:

1. That the defendants, Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, constituting the Corporation Commission of North Carolina, and each of them, individually and jointly, as constituting the said Corporation Commission of North Carolina, and each and all of their successors in office, and their and each of their agents and employees, be, and they hereby are, restrained and enjoined from preparing or publishing the tariff of rates,
190 charges and tolls mentioned in the fifth section of the act in the bill in this cause mentioned, entitled "An Act to prevent Unjust Discrimination in freight rates and to fix maximum charges therefor," ratified March 9, 1907, and hereinafter referred to as the act in respect to freight rates, and from classifying the railroads operating in North Carolina in accordance with, and from publishing, the rates fixed by an act of the General Assembly of North Carolina, in the bill in this cause mentioned, entitled "An Act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina," ratified March 2, 1907, and hereinafter referred to as the act in respect to passenger rates.

2. That the defendants, Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, constituting the Corporation Commission of North Carolina, and each of them, individually and jointly, as constituting the said Corporation Commission of North Carolina, and each and all of their successors in office, and their and each of their attorneys, agents and employees, and the defendants Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, their and each of their successors in office, and their and each of their attorneys, agents and employees are, and each of them is, hereby restrained and enjoined from taking any steps in pursuance of said act in respect to freight rates, or of said act in respect to passenger rates, or of any of the laws of the State of North Carolina, either directly or by or through any other attorney, agent

or employee, or otherwise, and either by any suit, prosecution or proceeding, civil or criminal, or otherwise from enforcing, or endeavoring to put into effect, or to force the complainant, or any of its officers, agents or employees to put into effect, the said act in respect to freight rates, or the said act in respect to passenger rates or any part of either of said acts, or the penalties prescribed, or provided for, in either of said acts, or any other penalties or punishments against the complainant Southern Railway Company, or against any of its officers, agents or employees, for failure to put into effect or to observe on any of the lines of said complainant in North Carolina the freight rates or the passenger rates prescribed in said acts, or for failure to comply with either of said acts or any provision thereof.

3. That all other individuals, persons or corporations are, and each of them is, hereby restrained and enjoined from instituting or prosecuting any suit or prosecution or other proceeding, either civil or criminal, against said complainant, or against any officer, agent or employee of said complainant, for the recovery of any damages or overcharges, or for the recovery or imposition of any penalty
191 or punishment under or by virtue of said act in respect to freight rates or the said act in respect to passenger rates, or under or by virtue of any law of North Carolina because of, or growing out of, the failure of said complainant or any of its officers, agents or employees to put into effect, or to observe on any of the lines of the complainant in North Carolina the freight rates or the passenger rates prescribed in said acts, or to comply with any of the provisions of either of said acts.

4. That the defendants, and each of them, show cause before this court in the United States Court Room at Asheville, N. C., at ten o'clock a. m. on Wednesday, the 26th day of June, 1907, why an injunction *pendente lite*, as prayed in the bill, should not be issued, and that a copy of this order be served as soon as practicable upon each of the defendants.

5. That this restraining order shall be in force and effect from the date hereof, and until the determination of the complainant's motion for an interlocutory injunction herein; provided, however, that upon the failure of the complainant, or some one for it, to execute, within ten days from this date, a bond in the penalty of Ten Thousand dollars, payable to the defendants with surety approved by one of the judges of this court, and conditioned substantially as hereinafter mentioned, the said restraining order shall stand dissolved. The condition of said bond shall be substantially as follows:

"The condition of the above obligation is such that

Whereas a restraining order has been made in the above entitled cause by the terms of which the defendants, and each of them, are restrained, until an application for an interlocutory injunction herein shall be determined, from doing or causing to be done, certain acts mentioned in said restraining order; now should said restraining order be dissolved or vacated as having been wrongfully issued, or because the said acts were improperly restrained, then that the above named Southern Railway Company shall pay, or cause

to be paid, all damages caused by the issue of said restraining order and the costs of this cause in connection therewith."

6. That, if for any reason the determination of the motion for an injunction *pendente lite* be not made until after July 1, 1907, the date fixed in the Acts of the General Assembly of North Carolina for the rates thereby prescribed to go into effect, then the complainant shall, prior to that date, apply to this court, or a judge thereof, for an order directing the giving of a bond by the complainant as prayed for in the twelfth paragraph of the bill in this cause, to secure the payment into the registry of this court, in case the said Acts of Assembly herein complained of are in this cause
192 finally declared valid and constitutional, of the excess which the complainant may receive on business covered by said Acts, over the amount it would have been entitled to receive on the basis of charges prescribed by the said Acts.

This May 8th, 1907.

J. C. PRITCHARD,
United States Circuit Judge.

And thereupon came the above named complainant and filed the bond as provided in this order, which bond was this day approved by a Judge of this court as a full compliance with the provision thereof requiring the giving of a bond.

May 8, 1907.

[SEAL.]

J. C. PRITCHARD,
United States Circuit Judge.

Received at Raleigh, N. C., May 9, 1907, and executed this day by delivering a copy of within Restraining Order to Franklin McNeill, Samuel L. Rogers & Eugene C. Beddingfield, at their office, Raleigh, N. C. and on May 10, 1907, executed upon Robert D. Gilmer & Hayden Clement by delivering a copy of within Restraining Order to Miss Sarah Burkhead, Stenographer of said parties, at office of Attorney General, Raleigh, N. C.

CLAUDIUS DOCKERY,
U. S. Marshal,
Per P. A. MITCHELL,
Office Deputy Marshal.

Restraining Order Bond.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
v.
FRANKLIN MCNEILL ET ALS., Defendants.

Know all men by these presents that
Southern Railway Company, a corporation of the State of Virginia, the principal office of which is in the City of Richmond in

said State, as principal, and The United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the defendants, Franklin McNeill, Samuel L. Rodgers, Eugene C. Bed-
193 dingfield, Robert D. Gilmer, and Hayden Clement in the just and full sum of Ten thousand dollars, for the payment of which well and truly to be made we do hereby jointly and severally bind ourselves, and each of our successors, firmly by these presents,

Sealed with our seals and dated this 8th day of May, in the year 1907;

The condition of this obligation is such that whereas a restraining order has been made in the above entitled cause by the terms of which the defendants, and each of them, are restrained until an application for an interlocutory injunction herein shall be determined, from doing or causing to be done, certain acts mentioned, in said restraining order, now should said restraining order be dissolved or vacated as having been wrongfully issued, or because the said acts were improperly restrained, then, if the above named Southern Railway Company shall pay, or cause to be paid, all damages caused by the issue of said restraining order, and the costs in this cause in connection therewith, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In testimony whereof the parties hereto have caused these presents to be duly signed in their respective names and their respective seals to be hereunto affixed, duly attested, this eighth day of May in the year 1907.

SOUTHERN RAILWAY COMPANY,
[SEAL.] By A. B. ANDREWS, *First Vice-President.*

Attest:
GEO. R. ANDERSON,
Assistant Secretary.

THE UNITED STATES FIDELITY
AND GUARANTY COMPANY,
By E. LESLIE SPENCE, JR.,
[SEAL.] *Attorney in Fact.*

Approved as a full compliance with the provision of the restraining order entered in this cause on the 8th day of May, 1907, requiring the giving of a bond

J. C. PRITCHARD,
U. S. Circuit Judge.

4. Your complainant showeth that the said restraining order and notice to show cause why an injunction *pendente lite* as prayed in the bill should not be issued was made returnable on the 26th day of June, 1907, at the court room of this Honorable Court in
194 the city of Asheville, and that on the said day this complainant and the said defendants in the said original bill named, duly appeared by counsel before his Honor, Jeter C. Pritch-

ard, United States Circuit Judge, and one of the Judges of this Honorable Court, and that after a full hearing and full argument this Honorable Court took jurisdiction of the said cause and entered an order granting an interlocutory injunction herein, which said order and interlocutory injunction were in the words and figures as follows:

In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
v.
FRANKLIN MCNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, ROBERT D. GILMER, and HAYDEN CLEMENT, Defendants.

Before Honorable J. C. Pritchard, Judge of said court.

In pursuance of the order to show cause, made herein on the eighth day of May, 1907, by which the said defendants were ordered to appear in the United States court room at Asheville, North Carolina, at ten o'clock A. M. on Wednesday, the twenty-sixth day of June, 1907, to show cause, if any they had or could show, why an injunction *pendente lite*, as prayed in the bill, should not be issued, the defendants appeared in the said court room at the time mentioned and filed their answer in writing to the said bill, and thereupon the complainant moved before the judge of this court for an interlocutory injunction as prayed in the said bill, and the said motion was heard upon the bill of complaint in this cause, and answer thereto, treated as affidavits, and upon the affidavits filed herein by the complainant, and the said motion was argued by counsel.

And the same having been fully considered, it is now ordered:

1. That until the further order of the court herein, the defendants, Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield, constituting the Corporation Commission of North Carolina, and each of them individually, and jointly as constituting the said Corporation Commission of North Carolina, and each and all of their successors in office, and their and each of their agents and employees, be, and they hereby are, enjoined and restrained
195 from preparing or publishing the tariff of rates, charges and tolls mentioned in the fifth section of the act in the bill in this cause mentioned, entitled "An Act to prevent unjust discrimination in freight rates and to fix the maximum charges therefor," ratified March ninth, 1907, and hereinafter referred to as the "Act in respect to freight rates," and from classifying the railroads operating in North Carolina in accordance with, and from publishing the rates fixed by, an act of the General Assembly of North Carolina in the bill in this cause mentioned, entitled "An Act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina," ratified March second, 1907, and

hereinafter referred to as the "Act in respect to passenger rates," and from naming and designating the ticket offices in North Carolina at which mileage books good on a line of this complainant shall be kept on sale.

2. That until the further order of the court herein, the defendants Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield, constituting the Corporation Commission of North Carolina, and each of them individually, and jointly as constituting the said Corporation Commission of North Carolina, and each and all of their successors in office, and their and each of their attorneys, agents and employees, and the defendants Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, their and each of their successors in office, and their and each of their attorneys, agents and employees, are, and each of them is, hereby restrained and enjoined from taking any step or steps, in pursuance of said Act in respect to freight rates, or of said Act in respect to passenger rates, or of any of the laws of the State of North Carolina, either directly, or by or through any other attorney, agent or employee or otherwise, or by any suit, prosecution or proceeding, civil or criminal, or in any other manner, for the purpose of enforcing or endeavoring to put into effect as against the complainant or any of its officers, agents or employees, or to force the complainant, or any of its officers, agents or employees to put into effect, said Act in respect to freight rates, or the said Act in respect to passenger rates, or any part of either of said acts, or the penalties prescribed, or provided for, in either of said acts, or any other penalties or punishments against the complainant, Southern Railway Company, or against any of its officers, agents or employees for failure to put into effect, or to observe, on any of the lines of the said complainant in North Carolina the freight rates, or the passenger rates, prescribed, or provided for, in said acts, or either of them, or for failure to comply with either of said acts, or with any provision of either of them.

196 3. That, until the further order of the court herein, all other individuals and corporations are, and each of them is, hereby restrained and enjoined from instituting, or prosecuting, any suit or prosecution or other proceeding, either civil or criminal, against said complainant, or against any officer, agent or employee of said complainant, for the recovery or imposition of any penalty or punishment, under or by virtue of said Act in respect to passenger rates, or the said Act in respect to freight rates, or under or by virtue of any law of North Carolina, because of, or growing out of, the failure of the said complainant, or any of its officers, agents or employees, to put into effect, or to observe, on any of the lines of the complainant in North Carolina the freight rates or the passenger rates prescribed in said acts, or in either of them, or to comply with any of the provisions of either of said acts, or for the recovery of any damages or overcharges, because of, or growing out of, any such failure, or for the enforcement of any claim, alleged right or cause of action, growing out of, or connected with, any such failure.

4. That said complainant, or some one for it, shall, before a judge of this court, or the clerk thereof, execute a bond in the penalty of

three hundred and twenty-five thousand dollars, with surety to be approved by such judge, or by such clerk, conditioned to pay into the registry of this court, from time to time, when and as the court may so order, such sum or sums of money as shall be equal to the difference between the aggregate freight and passenger rates and excess baggage charges charged and received by it for intrastate services on its lines in the State of North Carolina, and what would have been the aggregate amount for such services at the rates fixed in or under the said Acts of Assembly, and further conditioned that, whereas an interlocutory injunction has been issued in the above entitled cause, by the terms of which the defendants, and each of them, are restrained until the further order of the court, as from said order will appear, now, should such interlocutory injunction be dissolved or vacated as having been wrongfully issued, or because the said acts were improperly restrained, then that the complainant shall pay, or cause to be paid, all damages caused by the issue of such interlocutory injunction and the cost of this cause in connection therewith.

5. That the complainant shall give to any person purchasing a ticket for intrastate travel on its lines in the State of North Carolina, and to any person purchasing a mileage book for travel on its lines in North Carolina, but not good outside of said state, a transferable coupon, or other written or printed evidence, representing the sum which such person, or his transferee, will, upon a final decision
197 in this cause upholding the validity of said Act in respect to passenger rates, be entitled to receive, out of the cash deposit to be made in the registry of this court in pursuance of the obligation of the bond hereinbefore mentioned. The form of said coupon, or of other written or printed evidence, shall be substantially as follows:

"SOUTHERN RAILWAY COMPANY.

"*North Carolina Ticket Claim Coupon.*

"To be Retained by Passenger. Not Good for Passage.

"Issued under an order of the Circuit Court of the United States for the Eastern District of North Carolina, in a suit therein pending between Southern Railway Company, Complainant, and Franklin McNeill *et al.*, Defendants.

"Southern Railway Company has, on the date stamped hereon, received in connection with the sale of the ticket of corresponding form and number, the rate designated in the tariff of this Company in effect on date of sale, for travel between points designated in such ticket within the State of North Carolina to which ticket this coupon is attached. This coupon is evidence only of a claim for the difference between the amount received and what would have been the amount if the distance covered by said ticket had been paid for at the rate fixed by North Carolina Act, approved March 2d, 1907, prescribing maximum passenger charges, and is payable only on the order and out of the registry of said court, upon surrender to

the court of this coupon, and upon such conditions, if any, as said court may impose, provided it should be finally determined in said suit that the said claim is entitled to such payment.

"In case the ticket with which this coupon corresponds is presented for redemption it must be presented at General Passenger Agent's office, Washington, D. C., accompanied by this coupon, either for surrender or for appropriate notation."

And the complainant shall give to any person checking baggage to be carried by the complainant between two points both of which are in the State of North Carolina, and which does not pass out of the state en route, and who has paid to the complainant any charge thereon for excess baggage, a transferable coupon or other written or printed evidence, representing the difference between the amount so paid and what would have been paid if there had been an allowance to such person of two hundred pounds of baggage as provided in said Act in respect to passenger rates, such difference to be payable to such person or to his transferee, upon a final decision in this cause upholding the validity of such Act in respect to pas-
198 senger rates, out of the cash to be deposited in the registry of this court, in pursuance of the obligation of the bond hereinbefore mentioned; such coupon, or other written or printed evidence, shall be substantially in the following form:

"SOUTHERN RAILWAY COMPANY.

"Issued by Southern Railway Company.

"North Carolina Excess Baggage Check.

"*North Carolina Excess Baggage Claim Coupon.*

"To be Retained by Passenger.

"Issued under an order of the Circuit Court of the United States for the Eastern District of North Carolina, in a suit therein pending between Southern Railway Company, Complainant, and Franklin McNeill *et al.*, defendants.

"Southern Railway Company has received, in connection with the issuance of excess baggage check of corresponding form and number, the amount computed from the excess baggage tariff of this company in effect on July 1, 1907, for the transportation of the passenger's baggage in excess of 150 pounds in weight, between the points designated in such excess baggage check within the State of North Carolina, to which excess baggage check this coupon is attached.

"This coupon is evidence only of a claim for the difference between the amount received and what would have been received, had there been an allowance to the passenger of 200 pounds of baggage, as provided in the North Carolina Act, approved March 2, 1907; and is payable only on the order, and out of the registry of said

court, upon surrender to the court of this coupon, and upon such conditions, if any, as said court may impose, provided it should be finally determined in said suit that the said claim is entitled to such payment."

But nothing herein contained shall be construed as requiring the complainant to issue any such coupon, or any such other written or printed evidence, in connection with the sale of any mileage book, or any ticket, good for an interstate passage or for passage in another state or in other states.

6. That the complainant shall preserve to be produced whenever so ordered by the court herein all canceled tickets and excess baggage check stubs in respect to which such coupons or other written or printed evidence may have been issued, and may be outstanding, and shall from time to time report to the court,
199 at intervals to be fixed by an order of the court herein, statements showing the revenue by it charged and collected for its services in the North Carolina intrastate transportation of passengers, baggage and freight in excess of the amounts permitted by said Act in respect to passenger rates and said Act in respect to freight rates. As to each of such shipments of freight the complainant shall report the name of the shipper, the date and place of shipment, and the amount of such excess. The complainant shall from time to time give such further bond or bonds as the court may require to secure the proper payment into the registry of the court of all the amounts which finally it shall be adjudged that it should so pay, under the final decision in this cause.

7. If it shall be determined herein that the complainant is entitled to the amounts covered by said bond, or bonds, then said bond, or bonds, shall be released and canceled by the court, and if any amount shall have then been paid into the registry of the court pursuant thereto, then, upon such determination in favor of the complainant, the sum, or sums, so paid into the registry shall be repaid to the complainant without further order of the court herein.

8. Leave is hereby granted to the complainant, if it be so advised, to make, by supplemental process, as new parties defendant, any person or corporation, attorney or solicitor, who may attempt or threaten to assert, or enforce, against the complainant or against any of its officers, agents or employees any alleged right, remedy, penalty or punishment, under either of said acts or otherwise, because of the failure of the complainant, or of any of its officers, agents or employees, to put into effect, or to observe, any rate prescribed in said Act in respect to passenger rates, or in said Act in respect to freight rates, or any other provision of said acts, or either of them.

9. That the restraining order heretofore granted in this cause shall be construed as remaining in full force and effect until this interlocutory injunction shall take effect.

10. It is further ordered that a writ of injunction shall forthwith issue in accordance with this order.

11. The defendants, having by counsel in open court stated that they regard the answer filed on the said motion for an interlocutory

injunction as their answer in this cause, and having given their consent that the same shall be so considered, and that the complainants shall forthwith file a replication thereto, and that the said cause shall be considered at issue, it is now ordered that it be referred to the Honorable W. A. Montgomery, Standing Master of this court for the Eastern District of North Carolina, to take and to the court report such evidence on any of the issues herein as either party may
200 offer, and to make all needed computations, and report fully to the court the facts thereon; that for that purpose the Master shall have the right to sit from time to time in the City of Washington and at any point he may elect in the State of North Carolina or elsewhere, for the purpose of facilitating the taking of the said evidence, and the said hearing before him, and that he shall report to the court the said evidence and his findings thereon not later than the 25th day of September, 1907. The said Master shall determine what time is to be allotted to the complainant for the taking of its evidence and what time shall be allotted to the defendants for the taking of their evidence.

This cause, by consent of the parties hereto given in open court, is set down for hearing before this court in the City of Asheville on the first Monday of October, in the year 1907.

12. Thereupon the complainant tendered its bond to comply with the provisions in respect to a bond in this order duly executed by the complainant as principal, and by the United States Fidelity & Guaranty Company, as surety, which said bond and the execution thereof and the surety thereto are approved.

J. C. PRITCHARD,
United States Circuit Judge.

June 29, 1907.

In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
vs.
FRANKLIN MCNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, ROBERT D. GILMER, and HAYDEN CLEMENT, Defendants.

The President of the United States of America to Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, Robert D. Gilmer, and Hayden Clement, and to all other individuals and corporations, their and each of their attorneys, agents, and employees, Greeting:

The honorable Judge of the Circuit Court of the United States for the Eastern District of North Carolina, sitting in vacation, having, on the 29th day of June, 1907, after due notice and hearing, ordered that an injunction issue as herein stated, therefore:

201 1. Until the further order of the court herein, the defendants, Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield, constituting the Corporation Commission of North Carolina, and each of them individually and jointly as constituting

the said Corporation Commission of North Carolina, and each and all of their successors in office, and their and each of their agents and employees, are, and each of them is, hereby enjoined and restrained from preparing or publishing the tariff of rates, charges and tolls mentioned in the fifth section of the Act in the bill in this cause mentioned, entitled "An Act to prevent unjust discrimination in freight rates, and to fix the maximum charges therefor," ratified March ninth, 1907, and hereinafter referred to as the "Act in respect to freight rates," and from classifying the railroads operating in North Carolina in accordance with, and from publishing the rates fixed by, an act of the General Assembly of North Carolina in the bill in this cause mentioned, entitled "An Act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina," ratified March second, 1907, and hereinafter referred to as the "Act in respect to passenger rates," and from naming and designating the ticket offices in North Carolina at which mileage books good on a line of this complainant shall be kept on sale.

2. Until the further order of the court herein, the defendants Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield, constituting the Corporation Commission of North Carolina, and each of them individually, and jointly as constituting the said Corporation Commission of North Carolina, and each and all of their successors in office, and their and each of their attorneys, agents and employees, and the defendants Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, their and each of their successors in office, and their and each of their attorneys, agents and employees, are, and each of them is, hereby restrained and enjoined from taking any step or steps, in pursuance of said Act in respect to freight rates, or of said Act in respect to passenger rates, or of any of the laws of the State of North Carolina, either directly, or by or through any other attorney, agent or employee or otherwise, or by any suit, prosecution or proceeding, civil or criminal, or in any other manner, for the purpose of enforcing or endeavoring to put into effect as against the complainant or any of its officers, agents, or employees, or to force the complainant, or any of its officers, agents or employees to put into effect, said Act in respect to freight rates, or the said Act in respect to passenger rates, or any part of either of said acts, or the penalties prescribed, or provided for, in either of said acts, or any other penalties or punishments against the com-
202 plainant, Southern Railway Company, or against any of its officers, agents or employees for failure to put into effect, or to observe, on any of the lines of the said complainant in North Carolina the freight rates, or the passenger rates, prescribed, or provided for, in said acts, or either of them, or for failure to comply with either of said acts, or with any provision of either of them.

3. Until the further order of the court herein, all other individuals and corporations are, and each of them is, hereby restrained and enjoined from instituting, or prosecuting, any suit or prosecution or other proceeding, either civil or criminal, against said complainant, or against any officer, agent or employee of said com-

plainant, for the recovery or imposition of any penalty or punishment, under or by virtue of said Act in respect to passenger rates, or the said Act in respect to freight rates, or under or by virtue of any law of North Carolina, because of, or growing out of, the failure of the said complainant, or any of its officers, agents or employees, to put into effect, or to observe, on any of the lines of the complainant in North Carolina the freight rates or the passenger rates prescribed in said acts, or in either of them, or to comply with any of the provisions of either of said acts, or for the recovery of any damages or overcharges, because of, or growing out of, any such failure, or for the enforcement of any claim, alleged right or cause of action, growing out of, or connected with, any such failure.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of Raleigh in the State of North Carolina, this 29th day of June, 1907.

H. L. GRANT, *Clerk*,
[SEAL.] By GEO. L. TOUNOFFSKI, *D. C.*

A true copy.
Attest:
H. L. GRANT, *Clerk*,
By GEO. L. TOUNOFFSKI, *D. C.* [SEAL.]

Recd. & served July 1, 1907, upon Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield by delivering to each of them personally a copy of this order. Service could not be made upon R. D. Gilmer and Hayden Clement for the reason that neither of them could be found in this District. The office of the Attorney General being closed and no clerk or stenographer in the City.

CLAUDIUS DOCKERY, *U. S. M.*
By J. F. SHARP, *O. D. M.*

Fees $6.00.

5. Your complainant further showeth that since the filing of the original bill in this cause and since the issuing of the injunction *pendente lite*, against the Corporation Commission, the body charged under the laws of the State of North Carolina with fixing just and reasonable rates which this complainant may charge for transporting passengers over its lines, and after this Honorable Court had taken jurisdiction of the subject matter, the defendant J. A. Spence, as attorney at law of the other defendants, J. R. McKenzie, W. C. Hurley, F. A. Henley, W. M. Hooker, Charles A. Armstrong,
203 L. F. Nance, Spencer Howell, Robert Howell, Coon Howell, Henry Smitherman, Jesse Eldridge, Claude Howell, Wallace Armstrong and Guy Smitherman, the last four being infants under the age of twenty-one years, and J. M. Way as the next friend for the said infants, and the said defendants just above mentioned, through their attorney J. A. Spence, instituted suits against your complainant in the Superior Court of Randolph County in the State of North Carolina, seeking to recover penalties or damages because this complainant sold tickets for passage in North Carolina upon the terms

authorized by said injunction order, and because of the alleged failure of your complainant to sell tickets good over its lines at the rate of two and one quarter cents per mile, being the rates named in the said act ratified March 2, 1907, and entitled "An act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina," and the said E. B. Hatch through his attorney Elijah Moffitt, instituted a similar action in said Superior Court of Randolph County, to recover similar penalties; that all of said suits are returnable to the next regular term of the said Superior Court of Randolph County which convenes on the 15th day of July 1907; that thereupon this complainant filed in the Circuit Court of the United States for the Eastern District of North Carolina its supplemental bill of complaint against the above named defendants, which said supplemental bill is in words and figures as follows:

204 In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,

v.

FRANKLIN MCNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, ROBERT D. GILMER, and HAYDEN CLEMENT, Defendants.

In Equity.

Supplemental Bill.

To the Honorable Judges of said Court:

The supplemental bill of complaint of Southern Railway Company, a corporation of the State of Virginia, duly organized and existing under and by virtue of the laws of that State, having its principal office in the city of Richmond, and the State of Virginia, and being a citizen of said State, against J. A. Spence, Elijah Moffitt, J. R. McKenzie, E. B. Hatch, W. C. Hurley, F. A. Henley, W. M. Hooker, Charles A. Armstrong, L. F. Nance, Spencer Howell, Robert Howell, Coon Howell, Henry Smitherman, and Jesse Eldridge, Claude Howell, Wallace Armstrong, and Guy Smitherman, the last four being infants under the age of twenty-one years, J. M. Way, and B. C. Beckwith, defendants.

And thereupon your complainant says:

1. That on the eighth day of May, 1907, your complainant exhibited its original bill of complaint in this honorable court against Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield, who constitute the Corporation Commission of North Carolina, Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General of said State, defendants, all of said defendants being citizens of the State of North Carolina.

2. And your complainant alleged in its said original bill that it was duly incorporated and organized into a railroad corporation under an act of the General Assembly of the State of Virginia, approved February 20, 1894; that by the terms of its charter it was authorized to own, operate and control lines of railroad in other states as well as in Virginia; that under and by virtue of such powers and by virtue of due authority from the states about to be
205 mentioned, the complainant owns, controls and operates, and continuously since its said organization has operated and controlled, lines of railroad (in addition to those which it owns, operates and controls in the State of Virginia) in the States of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, Kentucky, Indiana, and Illinois; and that the complainant is, and continuously since its organization has been, engaged in doing an intrastate business as a common carrier of freight and passengers in the State of North Carolina, and in addition is, and continuously since its organization has been, engaged in doing, as such common carrier, a large interstate business in North Carolina, and in and between said state and the other states aforesaid, and other states of the United States, and in and between other states and territories of the United States, and also is, and since its said organization has been, engaged in said state and the other states aforesaid in foreign commerce.

3. And your complainant alleged in its said bill that the effect of two certain acts passed by the General Assembly of North Carolina at its recent session, one of said acts being entitled "An Act to prevent unjust discrimination in freight rates and to fix the maximum charges therefor," hereinafter styled "Act in respect to freight rates," which said act was ratified on the ninth day of March, 1907, and the other of said acts being entitled "An Act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina," hereinafter styled "Act in respect to passenger rates," which said act was ratified on the second day of March, 1907, would, whether taken separately or together, if enforced, be to deprive your complainant of its property without just compensation and without due process of law, and to deny to it the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States, the benefit and protection of which your complainant in said bill specially set up and claimed, in that the effect of the said acts, and each of them, would be to deprive this complainant of its right to receive a fair and reasonable return upon the value of the property employed by it in the public intrastate service in the State of North Carolina, and to deprive it of the right to charge and receive its present rates in North Carolina, which are legal and not higher than a fair and reasonable compensation for the services rendered by it to the shippers and to the travelers upon its lines in the said State, and would also deprive your complainant of its right to increase its charges, whether freight or passenger, whenever under the circumstances then exist-
206 ing, the said charges are less than a reasonable compensation for the service which it renders.

4. And your complainant alleged in its said original bill that the requirements of the said acts, and each of them, would constitute a regulation of, and burden upon, interstate commerce, contrary to the commerce clause of the Constitution of the United States, in that the effect of the establishment of the rates and charges prescribed by, or provided for in, the said acts or either of them, and other requirements of the said acts or either of them, would be to inevitably affect the interstate rates of this complainant and would compel this complainant to give an undue preference to intrastate shippers and passengers in North Carolina, and subject to undue prejudice and disadvantage interstate shippers and passengers in the said State, and other states, and intrastate shippers and passengers in such other states.

5. And your complainant alleged in its said original bill that the effect of the provisions of Section 3 of the said act in respect to passenger rates, requiring that mileage books of one thousand miles in each book shall be kept on sale at such railroad ticket offices in North Carolina as shall be named and designated by the Corporation Commission of North Carolina, and that when any such mileage book is purchased it shall be good in the hands of any person or persons named therein on all railroads on which the fare is the same as, or less than, the fare on the road of the company selling such mileage book; and that when the mileage is detached from said book by any other railroad than the one which sold it, the said mileage shall be redeemable on demand by the railroad which sold it, is to deprive your complainant of the proper use of its property without due process of law, and to deny to it the equal protection of the laws, in that the effect of the provisions of the said section is to require the complainant to accept and carry out the contracts of other railroad companies as embraced in said milage book tickets, and to permit some other railroad company to collect money for the price of transportation which this complainant will be required to furnish, and moreover to constitute this complainant, without its consent, the agent of other railroad companies for the purpose of sale of tickets and the receipt and accounting for the price thereof, and, if such be the proper interpretation of the provisions of the said act, to redeem the mileage books of other carriers without reference to the length of time the same might be outstanding.

207 6. Your complainant further alleged in the said bill that the effect of the provisions of the said act in respect to freight rates making a rule for some railroads different from that made for the complainant, in respect to their freight rates and in respect to demurrage charges, and of the provisions of the act in respect to passenger rates making a difference in rates in favor of roads in said state whose mileage is sixty miles or under, over other railroads, and in favor of railroads constructed within twelve months preceding the first day of January, 1907, or at that time in course of construction, and such railroads as may be constructed within two years from January 1, 1907, over other railroads, is to deprive this complainant of the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States,

the benefit and protection of which this complainant again specially set up and claimed, in that the effect of the said provisions is to make a difference in the classification of the railroads operating in North Carolina, and to permit one carrier to charge for the same service in North Carolina a greater sum than is permitted to another carrier in North Carolina, without any reasonable basis for such difference in classification.

7. And your complainant alleged in its said bill that this suit is a controversy between citizens of different states and that the amount involved herein, exclusive of interest and costs, exceeds the sum or value of $2,000, and that this suit involves questions arising under the Constitution of the United States, and rights asserted by the complainant under said constitution and protected hereby.

8. And in said bill it was alleged that, by the above mentioned act in respect to freight rates, it is provided that any railroad company doing business in the State of North Carolina, or officer or agent thereof, who shall make charges for shipments of freight in violation of the provisions of said act shall be deemed guilty of a misdemeanor, and such corporation shall, upon conviction, be fined not less than one hundred dollars, and such officer or agent shall be fined or imprisoned, or both, in the discretion of the court; and that by the said act in respect to passenger rates it is provided that any railroad company violating any of the provisions of the act shall be liable to a penalty of five hundred dollars for each violation, payable to the person aggrieved by such violation, recoverable in an action to be instituted in the name of said person in any court of North Carolina having competent jurisdiction thereof, and that any agent, servant or employee of any railroad company violating said
208 act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned, or both, in the discretion of the court.

9. And complainant alleged in its said original bill that by means of these enormous penalties an effort is made to prevent inquiry into the validity of the above mentioned acts, and to so burden any challenge thereof in the courts that your complainant must necessarily submit rather than take the chances of the penalties imposed, and that, therefore, the effect of said penalties and of the legislation which imposes them is a denial to your petitioner of due process of law, and, since no other person or business in North Carolina is subjected to such penalties under the same circumstances, is to deprive your petitioner of the equal protection of laws, contrary to the fourteenth amendment to the Constitution of the United States.

10. And your complainant alleged in the said original bill that the defendants, Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield, constitute the Corporation Commission of the State of North Carolina, and that the defendant, Robert D. Gilmer, is the Attorney General and the defendant Hayden Clement, Assistant Attorney General, of the said state, and that all of said defendants have their offices in the city of Raleigh, in the State of North Carolina, and the defendants, Franklin McNeill, Eugene C. Beddingfield, and Robert D. Gilmer, are inhabitants of, and reside in, the Eastern Dis-

trict of North Carolina, and that all of said defendants are specially charged by the laws of North Carolina with certain duties in connection with the putting into effect of the acts above mentioned, and the enforcement thereof.

11. And your complainant alleged in its said original bill that it would be irremediably injured unless this honorable court should grant to it the relief, which was prayed for in the following terms:

"In consideration whereof, and forasmuch as your complainant is remediless in the premises under the rules of the common law and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable, and to the end, therefore, that the defendants hereinafter named may answer the several matters and things hereinbefore set forth as fully and particularly as if the same were again here repeated, and they were thereunto specially interrogated, but not under oath, answer under oath being expressly waived, the complainant prays that the said defendants be required so to answer, and that an injunction may be issued out of this court enjoining and prohibiting the defendants Franklin McNeill, Samuel L. Rogers and Eugene C. Bedding-
209 field, constituting the Corporation Commission of North Carolina, and each of them individually, and jointly as constituting the said Corporation Commission of North Carolina, and each and all of their successors in office, from preparing and publishing the tariff of rates, charges and tolls mentioned in said act in respect to freight rates, and from classifying the railroads operating in North Carolina in accordance with, and from publishing the rates fixed by said act in respect to passenger rates, and from taking any steps, under or in pursuance of the said act of the General Assembly of North Carolina entitled 'An Act to prevent unjust discrimination in Freight Rates and to fix maximum charges therefor,' ratified March 9, 1907, or under said act of the General Assembly of North Carolina entitled 'An Act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina,' ratified March 2, 1907, and from taking any step in pursuance of any of the laws of the State of North Carolina, either directly or through the said defendant, Robert D. Gilmer, Attorney General, or Hayden Clement, Assistant Attorney General, or by or through any other attorney at law, or otherwise to enforce either of said Acts or the penalties therein prescribed, or any other penalties against the complainant, or against any of its officers, agents, or employees, for failure to put into effect or to observe on any of the lines of complainant in North Carolina the said freight rates or the said passenger rates required by either of said Acts, and enjoining the defendants Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, each and every of them, and their and each of their successors in office, from taking any step under the laws of North Carolina, by themselves or through any other attorney at law, or otherwise, for the purpose of enforcing either of said Acts or any of the penalties thereby prescribed, or any other penalties against the complainant or against any of its officers, agents or employees, for failure to put into effect, or to comply with either of the

said Acts of the General Assembly of North Carolina or any of the provisions thereof, and enjoining each and all of said defendants, their servants or agents, from instituting or bringing, or causing to be instituted or brought, as aforesaid, any suit, either at law or in equity, against your complainant, or against any officer, agent or employee of your complainant, compelling your complainant, or any of its said officers, agents or employees to put into effect, or observe, either of said Acts, or any provision thereof, and enjoining and prohibiting the said Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, and each of them, and their successors in office, and each and every other attorney at law,
210 that may be employed or appointed by the said Corporation Commission of North Carolina, or by the said Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, Railroad Commissioners, or either of them, or by any other officer of the State of North Carolina, from bringing or prosecuting any action or proceeding, civilly or criminally, against your complainant, or any of its officers, agents or employees, for penalties or fines or damages, or for any cause of action whatsoever, for failure to put into effect on any of the said lines of railway of the complainant in North Carolina any of said tariffs, passenger or freight, or for failure to observe said Acts or either of them, or any provision of either, and from instituting or bringing or causing to be instituted or brought, any suit at law or in equity, for penalties or otherwise, against the complainant or any officer or agent of the complainant, for charging more for freight or passenger transportation than is provided by said Acts, or so as in any way to prevent or hinder the complainant from increasing its freight and passenger charges, to the extent that such increase may be fair, reasonable and just, and enjoining and prohibiting all other individuals, persons or corporations from instituting or prosecuting any suit or suits against the complainant, or against any officer, agent or employee of the complainant, for the recovery of any damages or overcharges, or for the recovery or imposition of any penalty or penalties, under or by virtue of said Acts or either of them, or under or by virtue of any other law of North Carolina, because of or growing out of the failure of the complainant or any of its officers, agents or employees, to put into effect, or observe, any of the provisions of said acts, or either of them; and that the said tariffs, freight and passenger, prescribed by said Acts, and each and every of the provisions of said Acts, and of each of them, be declared to be unreasonable, unfair and unjust to the complainant, and unconstitutional, null and void.

"That in the meantime, and until a decision can be had upon your complainant's motion for the injunction herein prayed, a restraining order may be granted, restraining the acts sought herein to be enjoined, your complainant hereby averring that there is danger of irreparable injury from delay if action should not be taken until such motion for an injunction can be tried upon its merits.

"That a writ of injunction be issued, etc., commanding, etc., enjoining the defendants as above prayed.

"That on a final hearing said injunction as herein prayed may be

made perpetual; that the said Act, ratified March 9, 1907, and the said Act, ratified March 2, 1907, providing for said freight and passenger tariffs, respectively, may each of them be declared null and void by a decree of this court, so far as the same relate to any of your complainant's said lines of railroad in North Carolina, or to any of its business, and that your complainant may have such other
211 and further relief as in justice it may be entitled to, and as to equity is meet.

"That this complainant may have leave to make, by supplemental process, as new parties defendant, as occasion may require, any person or corporation who may appear asserting against this complainant, or against any of its officers, agents or employees, any alleged right or remedy under either of said acts, or otherwise, because of the failure of the complainant, or any of its officers, agents or employees, to put into effect, or to observe, any rate mentioned in either of said acts or any other provision of said acts, or either of them.

"May it please your Honors to grant unto your complainant the temporary restraining order aforesaid, the writ of injunction aforesaid, and the writ of subpœna addressed to said defendants Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, individually, and as constituting the Corporation Commission of North Carolina, and Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, commanding said defendants, under a penalty therein named, to appear in this court, on some certain day, to be thereby fixed, to answer the premises and abide by and perform such decree as may be passed herein, but said answer as above stated not to be made on oath, answer under oath being expressly waived."

All of which will more fully appear by reference to the said original bill in this cause.

12. And your complainant shows unto your Honors that the prayer of this complainant above set forth was granted by the Honorable J. C. Pritchard, a judge of this court, and that accordingly a restraining order issued out of this court on the eighth day of May, 1907, restraining, in substantial accordance with the terms of your complainant's prayer above set forth, until the determination of your complainant's motion for an interlocutory injunction, the acts sought to be enjoined.

13. Your complainant further shows that the said defendants having been duly served with process, appeared accordingly, and put in their answer to the said bill, and, evidence having been presented and argument heard on the part of your complainant and of the said defendants, the said Honorable J. C. Pritchard, having considered your complainant's bill of complaint, the answer of the said defendants thereto, and the evidence and argument presented, did, on the twenty-ninth day of June, 1907, enter a decree, granting the motion of your complainant for the injunction *pendente lite* prayed for, and awarded a writ of injunction as follows:

212 "In the Circuit Court of the United States for the Eastern District of North Carolina.

"SOUTHERN RAILWAY COMPANY, Complainant,

vs.

"FRANKLIN MCNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, ROBERT D. GILMER, and HAYDEN CLEMENT, Defendants.

"The President of the United States of America to Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, Robert D. Gilmer, and Hayden Clement, and to all other individuals and corporations, their and each of their attorneys, agents, and employees, Greeting:

"The honorable Judge of the Circuit Court of the United States for the Eastern District of North Carolina, sitting in vacation, having, on the 29th day of June, 1907, after due notice and hearing, ordered that an injunction issue as herein stated, therefore:

"1. Until the further order of the court herein, the defendants, Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield, constituting the Corporation Commission of North Carolina, and each of them individually, and jointly as constituting the said Corporation Commission of North Carolina, and each and all of their successors in office, and their and each of their agents and employees, are, and each of them is, hereby enjoined and restrained from preparing or publishing the tariff of rates, charges and tolls mentioned in the fifth section of the Act in the bill in this cause mentioned, entitled, 'An Act to prevent unjust discrimination in freight rates, and to fix the maximum charges therefor,' ratified March 9th, 1907, and hereinafter referred to as the 'Act in respect to freight rates,' and from classifying the railroads operating in North Carolina in accordance with, and from publishing the rates fixed by, an act of the General Assembly of North Carolina in the bill in this cause mentioned, entitled 'An Act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina,' ratified March 2d, 1907, and hereinafter referred to as the 'Act in respect to passenger rates,' and from naming and designating the ticket offices in North Carolina at which mileage books good on a line of this complainant shall be kept on sale.

"2. Until the further order of the court herein, the defendants, Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield, constituting the Corporation Commission of North Carolina, and each of them individually, and jointly as constituting the
213 said Corporation Commission of North Carolina, and each and all of their successors in office, and their and each of their attorneys, agents and employees, and the defendants, Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, their and each of their successors in office, and their and each of their attorneys, agents and employees are, and each of them is, hereby restrained and enjoined from taking any step or steps, in pursuance of said Act in respect to freight rates, or of said

Act in respect to passenger rates, or of any of the laws of the State of North Carolina, either directly, or by or through any other attorney, agent or employee or otherwise, or by any suit, prosecution or proceeding, civil or criminal, or in any other manner, for the purpose of enforcing or endeavoring to put into effect as against the complainant or any of its officers, agents, or employees, or to force the complainant, or any of its officers, agents or employees to put into effect, said Act in respect to freight rates, or the said Act in respect to passenger rates, or any part of either of said acts, or the penalties prescribed, or provided for in either of said acts, or any other penalties or punishments against the complainant, Southern Railway Company, or against any of its officers, agents or employees for failure to put into effect, or to observe, on any of the lines of the said complainant in North Carolina the freight rates, or the passenger rates, prescribed, or provided for, in said acts, or either of them, or for failure to comply with either of said acts, or with any provision of either of them.

"3. Until the further order of the court herein, all other individuals and corporations are, and each of them is, hereby restrained and enjoined from instituting, or prosecuting, any suit or prosecution or other proceeding, either civil or criminal, against said complainant, or against any officer, agent or employee of said complainant, for the recovery or imposition of any penalty or punishment, under or by virtue of said Act in respect to passenger rates, or the said Act in respect to freight rates, or under or by virtue of any law of North Carolina, because of, or growing out of, the failure of the said complainant, or any of its officers, agents or employees, to put into effect, or to observe, on any of the lines of the complainant in North Carolina the freight rates or the passenger rates prescribed in said acts, or in either of them, or to comply with any of the provisions of either of said acts, or for the recovery of any damages or overcharges, because of, or growing out of, any such failure, or for the enforcement of any claim, alleged right or cause of action, growing out of, or connected with, any such failure.

"Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of Raleigh, in the State of North Carolina, this 29th day of June, 1907.

[SEAL.] "H. L. GRANT, *Clerk*,

"By GEO. L. TOUNOFFSKI, *D. C.*"

214 14. Your complainant shows that since the granting of the said injunction *pendente lite*, it has come to the knowledge of your complainant that J. A. Spence, Elijah Moffit, J. R. McK[illegible], E. B. Hatch, W. C. Hurley, F. A. Henley, W. M. Hooker, Charles A. Armstrong, L. F. Nance, Spencer Howell, Robert Howell, Coon Howell, Henry Smitherman, and Jesse Eldridge, Claude Howell, Wallace Armstrong, and Guy Smitherman, the last four being infants under the age of twenty-one years, J. M. Way and B. C. Beckwith, are attempting or threatening to arrest or enforce against your complainant, or one or more of its officers, agents, or employees, an alleged right, remedy, penalty, or punishment, under said acts or one

of them, or some other act, of the State of North Carolina, because of the failure of your complainant, or of one or more of its officers, agents, or employees, to put into effect or observe a rate or rates prescribed in said act in respect to passenger rates, or in said act in respect to freight rates, or some other provision of said acts or either of them, in that the said J. A. Spence has instituted suit against your complainant in the Superior Court of Randolph County, North Carolina, as attorney representing J. R. McKenzie, W. C. Hurley, F. A. Henley, W. M. Hooker, Charles A. Armstrong, L. F. Nance, Spencer Howell, Robert Howell, Coon Howell, Henry Smitherman, Jesse Eldridge, Claude Howell, Wallace Armstrong, and Guy Smitherman, the last four being infants under the age of twenty-one years, and J. M. Way, and all the said parties last mentioned, have through the said J. A. Spence, as their attorney, instituted such suits in said Superior Court, and the said Elijah Moffitt has instituted against your complainant in said Superior Court, as attorney for E. B. Hatch, and the said E. B. Hatch has, through the said Elijah Moffitt, as his attorney, instituted such suits in said Superior Court against your complainant, and the said J. M. Way has as next friend for the said Jesse Eldridge, Claude Howell, Wallace Armstrong and Guy Smitherman, infants as aforesaid, through said J. A. Spence, as his attorney, instituted against complainant in said Court one of said suits; all of said suits being instituted, and having for their purpose, to enforce against this complainant, and in favor of said individuals respectively, the penalties provided in favor of individuals by Section 4 of an Act of the General Assembly of North Carolina, ratified on the 2nd day of March, 1907, and in said Bill referred to as the act in respect to Passenger Rates, the enforcing of which said penalties has already been enjoined by this Honorable Court in this cause; and the said B. C. Beckwith, as attorney for various parties, is about to institute, and unless prevented by the order of this Court, will institute against this complainant a number of suits for
215 the same purpose of enforcing against your complainant penalties provided by said Section 4 of the said Act in respect to passenger rates. The said B. C. Beckwith has, by a card published in the public press, expressed his willingness to bring these suits, notwithstanding the restraining order and injunction entered herein, of which said injunction the said B. C. Beckwith had notice at the time he made such publication, and since said publication the said B. C. Beckwith has accepted employment by the various parties for the purpose of enforcing against this complainant, contrary to the order heretofore entered herein, the penalties aforesaid, and has, as your complainant is informed and verily believes, thus obtained and accepted employment in a large number of such suits.

15. And your complainant shows that leave was granted to your complainant in the aforesaid interlocutory decree to make, by supplemental process as new parties defendant any person or corporation, attorney or solicitor, doing or threatening to do, the acts herein sought to be enjoined.

16. And your complainant shows that the effect of the provisions of the said act in respect to Freight Rates and of the said act in

respect to Passenger Rates, whether taken separately or together, imposing upon this complainant, in addition to the punishment of the officer, servant, agent or employee for a misdemeanor, for each shipment of freight at a greater rate than is allowed by the said act in respect thereto, a fine of one hundred dollars, and for each sale of a passenger ticket at a rate greater than is allowed by the said act in respect to passengers, a fine of five hundred dollars, is to impose excessive fines upon your complainant and to inflict cruel and unusual punishments upon it, in violation of Section 14 of Article 1 of the Constitution of North Carolina, the benefit and protection of which your complainant hereby respectfully sets up and claims.

17. And your complainant further shows that it will be irremediably injured unless an injunction be granted as hereinafter prayed for, and relief be given to it in this suit.

In consideration whereof, and forasmuch as your complainant is remediless in the premises under the rules of the common law, and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable, your complainant prays that the said J. A. Spence, Elijah Moffitt, J. R. McKenzie, E. B. Hatch, W. C. Hurley, F. A. Henley, W. M. Hooker, Charles A. Armstrong, L. F. Nance, Spencer Howell, Robert Howell, Coon Howell, Henry Smitherman, Jesse Eldridge, Claude Howell, Wallace Armstrong, Guy Smitherman, J. M. Way, and B. C. Beckwith be made parties defendant to this suit, and that they may be required to answer the several matters and things hereinbefore set forth as fully and particularly as if the same were again here repeated and they thereunto specially interrogated, but not under oath, answer under oath being expressly waived, and complainant prays that the said defendants and each of them be required so to answer, and that an injunction may be issued out of this court enjoining and prohibiting the said J. A. Spence, Elijah Moffitt, J. R. McKenzie, E. B. Hatch, W. C. Hurley, F. A. Henley, W. M. Hooker, Charles A. Armstrong, L. F. Nance, Spencer Howell, Robert Howell, Coon Howell, Henry Smitherman, Jesse Eldridge, Claude Howell, Wallace Armstrong, Guy Smitherman, J. M. Way, and B. C. Beckwith and their attorneys, solicitors and agents and all other persons, individuals and corporations from instituting, or prosecuting, or permitting or authorizing to be instituted or prosecuted, and from further prosecuting any suit or prosecution or other proceeding, either civil or criminal, against your complainant, or against any officer, agent, or employee of your complainant, for the recovery or imposition of any penalty or punishment, under or by virtue of said act in respect to freight rates, or the said act in respect to passenger rates, or under or by virtue of any law of North Carolina, because of, or growing out of, the failure of the said complainant, or any of its officers, agents, or employes, to put into effect, or to observe, on any of the lines of the complainant in North Carolina, the freight rates or the passenger rates prescribed in said acts, or in either of them, or to comply with any of the provisions of either of said acts, or for the recovery of any damages or over-

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charges, because of, or growing out of, any such failure, or for the enforcement of any claim, alleged right, or cause of action, growing out of, or connected with, any such failure.

And in the meantime, and until a decision can be had upon the complainant's motion for the injunction herein prayed for, that a restraining order may be granted, restraining the acts sought herein to be enjoined.

That, on the final hearing, said injunction, as herein prayed, may be made perpetual, and that your complainant may have such other and further relief as in justice it may be entitled to and as to equity is meet.

May it please your Honors to grant unto your complainant the temporary restraining order aforesaid, the writ of injunction
217 aforesaid, and the writ of subpœna addressed to said defendants, commanding said defendants, under a penalty therein named, to appear in this court, on some certain day, to be thereby fixed, to answer the premises and abide by and perform such decree as may be passed herein, but said answer, as above stated, not to be made on oath, answer under oath being expressly waived.

This is the first application by your complainant for leave to bring the said defendants into this cause as parties defendant and for a restraining order and injunction against said defendants by name.

SOUTHERN RAILWAY COMPANY,
Complainant,
By S. H. HARDWICK, *Passr. Traffic Manager.*

W. B. RODMAN,
A. C. AVERY,
F. H. BUSBEE,
MOORE & ROLLINS,
JOHN K. GRAVES,
Solicitors for Complainant.

____ ____,
Of Counsel.

UNITED STATES OF AMERICA, *District of Columbia, To wit:*

I, Harry F. Pierce, a Notary Public, duly commissioned, qualified, and acting as such in and for the city of Washington, in the District of Columbia, do hereby certify that S. H. Hardwick, whose name is subscribed to the foregoing bill, personally appeared before me this 11th day of July, 1907, and made oath that he is Passenger Traffic Manager of Southern Railway Company, the complainant in the foregoing supplemental bill of complaint; that he has read the foregoing bill and knows the contents thereof; that the facts therein stated, as of complainant's own knowledge, are true; and that the facts therein stated upon complainant's information and belief, he believes to be true.

My commission as notary public expires on the 17th day of July, 1910.

218 In witness whereof, I have hereunto signed my name and affixed my notarial seal at the city of Washington, in the District of Columbia, this 11th day of July, in the year 1907.

HARRY F. PIERCE,
Notary Public.

and obtained a restraining order against the said defendants, which said restraining order is in words and figures as follows:

In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
v.
FRANKLIN MCNEILL ET AL., Defendants.

Supplemental Proceeding.

Upon reading the verified supplemental bill in this cause, and upon its being made to appear to the court that there is danger of irreparable injury to the complainant from delay, unless the acts sought to be enjoined herein are restrained until the determination of the motion for an injunction in this cause, it is now ordered:

1. That J. A. Spence, Elijah Moffitt, J. R. McKenzie, E. B. Hatch, W. C. Hurley, F. A. Henley, W. M. Hooker, Charles A. Armstrong, L. F. Nance, Spencer Howell, Robert Howell, Coon Howell, Henry Smitherman, Jesse Eldridge, Claude Howell, Wallace Armstrong, Guy Smitherman, J. M. Way, and B. C. Beckwith are hereby made parties defendant in this cause.

2. That the said defendants J. A. Spence, Elijah Moffitt, J. R. McKenzie, E. B. Hatch, W. C. Hurley, F. A. Henley, W. M. Hooker, Charles A. Armstrong, L. F. Nance, Spencer Howell, Robert Howell, Coon Howell, Henry Smitherman, Jesse Eldridge, Claude Howell, Wallace Armstrong, Guy Smitherman, J. M. Way, and B. C. Beckwith and each of them, and their attorneys, solicitors and agents, and each of them, and all other persons, individuals, and corporations are hereby restrained and enjoined from instituting, or prosecuting, and from further prosecuting, any suit or prosecution or other proceeding, either civil or criminal, against the complainant or against any officer, agent, or employee of the complainant,
219 for the recovery or imposition of any penalty or punishment, under or by virtue of an act of North Carolina, ratified March 9, 1907, entitled "An Act to prevent unjust discrimination in freight charges and to fix maximum charges therefor," or an act of North Carolina, ratified March 2, 1907, entitled "An Act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina," or under or by virtue of any law of North Carolina, because of, or growing out of, the failure of the said complainant, or any of its officers, agents, or employees, to put into effect, or to observe, on any of the lines of the complainant in North Carolina the freight rates or the passenger rates prescribed in said

acts, or in either of them, or to comply with any of the provisions of either of said acts, or for the recovery of any damages or overcharges, because of or growing out of, any such failure, or for the enforcement of any claim, alleged right, or cause of action, growing out of, or connected with, any such failure.

3. That the defendants, and each of them show cause before the undersigned Judge of this court in the United States Court Room at Asheville, North Carolina, at ten o'clock, a. m., on the 12 day of August, 1907, why an injunction *pendente lite*, as prayed in the supplemental bill, should not be issued, and that a copy of this order be served as soon as practicable upon each of the said defendants.

4. That this restraining order shall be in force and effect from the date hereof, and until the determination of the complainant's motion for an interlocutory injunction herein.

This 13 day of July, 1907.

JETER C. PRITCHARD,
United States Circuit Judge.

6. Your complainant showeth unto your Honor that the larger part of your complainant's lines of railroad and other property are situated in the Western District of North Carolina, the remainder thereof in said state being situated in the Eastern District thereof, and that this complainant is entitled to invoke the ancillary
220 powers of this Honorable Court in the Western District of North Carolina for the purpose of more effectively dealing with the subject matter of this suit and protecting this complainant in its constitutional right and in having judicially determined in the Courts the controversy set out and defined in the original bill in this cause, which said original suit is still pending and undetermined in the Circuit Court of the United States for the Eastern District of North Carolina.

In consideration whereof and forasmuch as your complainant is remediless in the premises under the rules of the common law and can have adequate relief only in a Court of equity where matters of this nature are properly cognizable and relievable, and to the end, therefore, that the defendants hereinafter named may answer the several matters and things hereinbefore set forth as fully and particularly as if the same were again here repeated and they were thereunto specially interrogated, but not under oath, answer under oath being expressly waived, the complainant prays that the said defendants be required so to answer, and that an injunction may be issued out of this court enjoining and prohibiting the defendants above named, namely, Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, constituting the Corporation Commission of North Carolina, and each of them individually and jointly as constituting the State Corporation Commission of North Carolina, and each and all of their successors in office, from preparing and publishing the tariff of rates, charges and tolls mentioned in said act in respect to freight rates, and from classifying the railroads operating in North Carolina in accordance with, and from publishing the rates fixed by, such act in respect to passenger rates, and

from taking any steps under or in pursuance of the said act of the general assembly of North Carolina entitled: "An act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina," and enjoining and prohibiting the defendants: Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, Robert D. Gilmer, Hayden Clement, J. A. Spence, Elijah Moffitt, J. R. McKenzie, E. B. Hatch, W. C. Hurley, F. A. Henley, W. M. Hooker, Charles A. Armstrong, L. F. Nance, Spencer Howell, Robert Howell, Coon Howell, Henry Smitherman, Jesse Eldridge, Claude Howell, Wallace Armstrong, Guy Smitherman, the last four being infants under the age of twenty-one years, and J. M. Way and B. C. Beckwith, and each of them, their and each of their attorneys, agents and employees, from instituting or prosecuting, and from further prosecuting, any suit or prosecution which has been instituted, or from proceeding, either civilly or criminally, against the complainant, or against any officer, agent or employee of
221 the complainant, for the recovery or imposition of any penalty or punishment under or by virtue of an act of the general assembly of North Carolina, ratified March 9th, 1907, entitled "An Act to prevent unjust discrimination in freight charges and to fix maximum charges therefor," or an act of the general assembly of North Carolina ratified March 2, 1907, entitled "An act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina," or under or by virtue of any law of North Carolina, because of, or growing out of, the failure of the said complainant, or any of its officers, agents or employés, to put into effect, or to observe on any of the lines of the complainant in North Carolina, the freight rates or the passenger rates prescribed in said acts, or in either of them, or to comply with any of the provisions of said acts or for the recovery of any damages or overcharges because of, or growing out of, any such failure, or for the enforcement of any claim, alleged right, or cause of action, growing out of or connected with any such failure; that in the meantime, and until a decision can be had upon your complainant's motion for an injunction herein prayed, a restraining order may be granted restraining the acts sought herein to be enjoined, your complainant hereby averring that there is danger of irreparable injury from delay if action should not be taken until such motion for an injunction can be tried on its merits.

That a writ of injunction be issued, etc., commanding, etc., enjoining the defendants as above prayed.

That on a final hearing said injunction as herein prayed may be made perpetual; that the said act ratified March 9, 1907, and said act ratified March 2, 1907, providing for said freight and passenger tariffs, respectively, may each of them be declared null and void by a decree of this court, so far as the same relate to any of your complainant's said lines of railroad in North Carolina, or to any of its business, and that the provisions of said act in respect to penalties be declared null and void, as contrary to the fourteenth amendment to the Constitution of the United States, and that your complainant

may have such other and further relief as in justice it may be entitled to and as to equity is meet.

That this complainant may have leave to make, by supplemental process, as new parties defendant, as occasion may require, any person or corporation who may appear asserting against this complainant, or against any of its officers, agents or employés, any alleged right or remedy under either of said acts, or otherwise, because of the failure of the complainant, or any of its officers, agents or em-
222 ployés, to put into effect, or to observe, any rate mentioned in either of said acts or any other provision of said acts, or either of them.

May it please your Honors to grant unto your complainant the temporary restraining order aforesaid, the writ of injunction aforesaid, and the writ of subpœna addressed to said defendants Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, Robert D. Gilmer, Hayden Clement, J. A. Spence, Elijah Moffitt, J. R. McKenzie, E. B. Hatch, W. C. Hurley, F. A. Henley, W. M. Hooker, Charles A. Armstrong, L. F. Nance, Spencer Howell, Robert Howell, Coon Howell, Henry Smitherman, Jesse Eldridge, Claude Howell, Wallace Armstrong, Guy Smitherman, the last four being infants under the age of twenty-one years, and J. M. Way and B. C. Beckwith, commanding said defendants, under a penalty therein named, to appear in this court, on some certain day, to be thereby fixed, to answer the premises and abide by and perform such decree as may be passed herein, but said answer as above stated not to be made on oath, answer under oath being expressly waived.

This is the first application by your complainant for a restraining order or injunction in this case as to J. A. Spence, Elijah Moffitt, J. R. McKenzie, E. B. Hatch, W. C. Hurley, F. A. Henley, W. M. Hooker, Charles A. Armstrong, L. F. Nance, Spencer Howell, Robert Howell, Coon Howell, Henry Smitherman, Jesse Eldridge, Claude Howell, Wallace Armstrong, Guy Smitherman, the last four being infants under the age of twenty-one years and J. M. Way and B. C. Beckwith.

SOUTHERN RAILWAY COMPANY,
Complainant,

By J. M. CULP,
Vice President.

W. B. RODMAN,
F. H. BUSBEE,
JOHN K. GRAVES,
MOORE & ROLLINS,
Solicitors for Compldinant.

FRANCIS LINDE STETSON,
ALEX. P. HUMPHREY,
WALTER D. HINES,
ALFRED P. THOM,
Of Counsel.

223 UNITED STATES OF AMERICA,
District of Columbia, To wit:

I, Harry F. Pierce, a Notary Public, duly commissioned, qualified, and acting as such in and for the city of Washington, in the District of Columbia, do hereby certify that J. M. Culp, whose name is subscribed to the foregoing bill, personally appeared before me this 13 day of July, 1907, and made oath that he is vice President of Southern Railway Company, the complainant in the foregoing ancillary bill of complaint; that he has read the foregoing bill and knows the contents thereof, and that the same is true to his own knowledge except as to those matters therein stated upon information and belief; and as to those matters he believes it to be true.

My commission as notary public expires on the 17 day of July 1910.

In witness whereof, I have hereunto signed my name and affixed my notarial seal at the city of Washington, in the District of Columbia, this 13 day of July, in the year 1907.

HARRY F. PIERCE,
Notary Public. [SEAL.]

224 RALEIGH, N. C., *July* 20, 1907.

Received the within ancillary bill July 20, 1907 and executed on the same day at Raleigh N. C. by delivering a copy each personally to Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, and B. C. Beckwith.

Service was not made on Robt. D. Gilmer or his assistant Hayden Clements, for the reason that neither could be found in this district, the office of the attorney general being closed.

It is reported that Robt. D. Gilmer is in Waynesville N. C. for the summer.

CLAUDIUS C. DOCKERY,
United States Marshal.

Costs $8.00.

Received July 20, 1907, Executed July 20, 1907 *1907*, by leaving copy of within to each J. A. Spence, Elijah Moffitt, E. B. Hatch, F. A. Henley, W. M. Hooker, and J. M. Way and by leaving a copy to each on July 22, J. R. McKenzie, W. C. Hensley, Charles A. Armstrong, L. F. Nance, Spencer Howell Robert Howell, Guy Smitherman, Coom Howell, Harry Smitherman, Jessee Eldridge, Claud Nowell, Wallace Armstrong.

J. M. MILLIKAN,
U. S. Marshal,
By J. M. ALLEN,
Deputy Marshal.

Fees $36.00.

Received 29" day of July by delivering a copy of within to Hayden Clement on July 29, 1907.

J. M. MILLIKAN,
U. S. Marshal,
By R. S. RAMSEY,
D. Marshal.

Fees $2.00.

West Dist. North Carolina. Office U. S. Marshal. Received Jul-20, 1907. No. 1700, Greensboro, N. C.

225 CHAPTER 35.

AN ACT TO ESTABLISH WITHIN THE CITY OF ASHEVILLE A SPECIAL COURT TO BE CALLED THE POLICE COURT AND PRESCRIBE THE JURISDICTION THEREOF.

The General Assembly of North Carolina do enact:

Police Court established.

SECTION 1. A Special Court for the trial of misdemeanors and to be designated as the "Police Court" of the City of Asheville is hereby established.

Court of Record.

Qualifications for Police Justice.

Term of office.

Elected as other officers.

Salary.

SEC. 2. Said Police Court shall be a Court of record and shall be presided over by a police justice who shall be licensed attorney of good moral character in good standing, and an elector of the City of Asheville, who shall hold office for a term of two years and he shall not be eligible to re-election. Said Police Justice shall be elected by the people at the time the other officers of the City of Asheville are elected, and he shall receive a salary of seventy-five dollars per month the same to be paid by the City of Asheville.

Sessions of Court.

SEC. 3. Said Police Court shall hold daily sessions at the city hall in the City of Asheville, and the daily sessions shall begin at nine A. M. and continue until the business of the Court is dispatched.

Jurisdiction and powers.

SEC. 4. Said Police Court shall have all the jurisdiction and powers in all criminal offenses occurring within the corporate limits of the City of Asheville which are now or may hereafter be given to justices of the peace, and shall also have exclusive original jurisdiction to hear and determine all offenses and misdemeanors consisting of a violation of an ordinance of said City.

Further jurisdiction.

SEC. 5. Said Police Court shall in addition to the jurisdiction conferred by section four of this act have exclusive original jurisdiction of all other criminal offenses committed within the corporate limits of said City below the grade of felony as now defined by law, and all such offenses committed within said city are hereby declared to be petty misdemeanors.

Warrants.

Appeals.

SEC. 6. Warrants may be issued by said Police Justice for any person or persons charged with the commission of any offense of which said court has jurisdiction and any person convicted in said Court shall have the right of appeal to the superior court, and upon such appeal the trial in the superior court shall be *de novo*.

Magistrates to bind over to police court.

SEC. 7. In all cases heard by the justices of the Peace and other committing magistrates against any person or persons for any offense included in section five of this act in which probable cause of guilty is found such person or persons shall be bound in a suitable recognizance with sufficient surety to appear at the next succeeding session of said Police Court for trial, and in default of such recognizance such person or persons shall be committed to the common jail of Buncombe County awaiting trial.

Trials upon warrants.

SEC. 8. All trials in said police court shall be upon warrant issued by said police court.

Costs upon warrants.

226 SEC. 9. All costs incurred in issuing of such warrants and for the serving of process arising upon warrants upon which any defendant shall be bound to said police court shall belong to and be the property of such justice of the peace or of a Sheriff of Buncombe County or the constable serving the same, as the case may be, and the same shall be paid to them by the proper authorities.

Punishments.

SEC. 10. Any person convicted in said police court or any of the offenses mentioned in section five of this act shall be fined, or imprisoned, or both fined and imprisoned, according to law. Every person convicted of an offense shall pay the costs of the prosecution.

Convicts sentenced to county roads.

SEC. 11. Whenever any person is convicted in said police court of any of the offenses mentioned in section five of this act, and the punishment imposed is imprisonment and costs, the police justice shall sentence the defendant to the county jail of Buncombe County to be worked upon the county roads of Buncombe County until such sentence has been complied with. Any person convicted of any other offense, over which said police court has jurisdiction, and not included in section five, where the punishment is imprisonment and labor, shall be required to work upon the streets of the City of Asheville until the judgment of the court is complied with.

Convicts sentenced to work on streets.

Police justice to preside and try causes.

SEC. 12. Said Police Justice shall preside over said police court, and try and determine all actions coming before him, the jurisdiction of which is conferred by this act, except in cases where he is legally incompetent to try the same, in which case, the said case shall be, upon application of the defendant removed for trial to such other court in the county of Buncombe as would, but for this act, have jurisdiction of the same.

Removal.

Legal incompetency defined.

Such legal incompetency shall be considered to mean only such incompetency as would disqualify a judge of the superior court to try under the same circumstances, a case pending in such last mentioned court.

Proceedings.

SEC. 13. The proceedings of the said police court shall be the same as are now or may hereafter be prescribed by law, for courts of justices of the peace, and in all cases there shall be a right of appeal on the part of the defendant adjudged guilty to the next term of the superior court. In all such cases of appeal the defendant shall be required to give bond with sufficient surety to insure the defendant's appearance at the next succeeding term of the superior court, and in default thereof, said police justice shall commit such defendant to the common jail of Buncombe County until said defendant shall give such bond or be otherwise discharged according to law.

Right of appeal.

Bonds for appearance.

Civil jurisdiction.

SEC. 14. Said court shall also have jurisdiction to try all actions for the recovery of any penalty imposed by law or this act, or by any ordinance of said city for any act done within said city; and such penalty shall be sued for and recovered in the name of said City of Asheville, and if incurred by a minor shall be recovered from and in an action against, his parents or guardian, or if he be an apprentice, against his master. From any judgment for such penalty imposed or allowed to be imposed by this act, or for the violation of any ordinance of said city, either party may appeal to the next term of the Superior Court of Buncombe County in like manner and under the same rules and regulations as are prescribed for appeals from judgments of justices of the peace and in case the police justice shall be disabled, by reason of relationship, or otherwise incompetent to hear and determine such action, the same may be instituted and prosecuted in any court within said County which would, but for this act have jurisdiction thereof, under the same rules and regulations as if instituted and tried in said police justice's court, where applicable. In all cases where judgments may be entered up against any persons for fines or penalties, according to the laws and ordinances of said City, as for criminal offenses, and the person or persons against whom the same is so adjudged, refuse, fail or are unable to pay such judgment, it shall be lawful for the police justice of said city to order and require such person or

Appeal.

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Judgment for penalties worked out.

persons to work on the streets or other public works of said city, under the supervision of the Chief of Police or street overseer thereof, and under such rules, regulations and forms of discipline as may be from time to time prescribed by the Board of Aldermen thereof, until, at a fair rate of wages to be prescribed by said Board of Aldermen, such person or persons shall have worked out the full amount of such judgment and costs of prosecution.

Penalties to use of city.

SEC. 15. All penalties collected for any misdemeanor consisting of a violation of the Charter or of any ordinance of said City, whether in the Court in which the prosecution originated or in the Court to which it was carried by appeal, shall belong to said City, and immediately upon collection shall be paid to the Treasurer of said City and all judgments rendered in any court for such fines or penalties shall belong to and be controlled by said City and collected in the same manner in which by law such judgments would, but for this section, be collected and enforced. All penalties hereinbefore provided to be recovered in the name of the said city of Asheville, shall belong and, upon collection, be paid to said city, and all judgments for the same shall belong to and be controlled by said city and be collected in the same manner, as other judgments for money are collected, and may be docketed in the superior court of this State in the same manner as is by law provided for the docketing of judgments, and when so docketed shall be and constitute liens in the same manner and to the same extent as other judgments so docketed.

Docketing judgment for penalties.

Precepts of police justices.

SEC. 16. The Police Justice of said City may issue his precepts to the sheriff of said county of Buncombe, or to any constable or policeman or to any officer to whom a justice of the peace may direct his precepts.

Minutes to be kept.

SEC. 17. The said Police justice shall cause to be kept a faithful minute of the precepts issued by him, and of all his judicial proceedings. Precepts issued by said police justice shall be executed by the Sheriff of Buncombe County or any of the police officers of the City of Asheville or other officers to whom they are directed, or any of them anywhere in the County of Buncombe, and the costs allowed in said Court shall be the same as those allowed by law in similar proceedings before justices of the peace: provided, however, that all costs recovered and collected in or on

Precepts to be executed.

Costs.

Costs to use of city.

account of any and all prosecutions or proceedings in said police court, whether collected in said police court or in the superior court, on appeal shall belong to said city and shall be turned over by the officer collecting the same, within ten days after said collection, to the Treasurer thereof to be used in and for the support and maintenance of the police department of said City; except, however, that the costs for all processes and warrants which may be due to any justice of
228 the peace in cases where defendants are bound to the police court, and all costs due to the sheriff of Buncombe County or any constable of Asheville Township, for serving any process issued by said Police justice or by any justice of the peace for Buncombe County, in cases in which said police court has jurisdiction (defendants are bound by said justices of the peace to the said police court), shall be paid to the officer or officers earning the same.

Vacancy.

SEC. 18. In case of a vacancy occurring in the office of police justice of said City for any cause, such vacancy shall be filled by the election of a police justice for the remainder of the term by the Board of Aldermen of said City. Said police justice shall be liable to removal from office by the Board of Aldermen, but only after notice of the charges against him and a full opportunity to be heard, and the penalty for misconduct, amounting to nonfeasance, misfeasance, or malfeasance in office. In case of the temporary absence of said police justice from the city, or other temporary inability or disability on his part to perform the duties of his office, the same shall devolve upon and be performed by the substitute police justice hereinafter provided for.

Police justice removable for cause.

Substitute Police Justice.

Election of substitutes.

SEC. 19. Immediately upon the qualification of said police justice, or as soon thereafter as may be practicable, and bi-annually thereafter, the Board of Aldermen of the city of Asheville shall elect a citizen of said City possessing all the qualifications required for police justices to fill the office of substitute police justice, which is hereby created. The term of office of said substitute police justice shall be concurrent with that of said police justice, and any vacancy occurring in said office of police justice shall be filled by said Board of Aldermen. Said substitute police justice shall receive in full compensation for his services the sum of five dollars per day for such time as he may be actually engaged in the per-

Pay of substitute.

formance of the duties of said police justice, the same to be deducted from the salary of said police justice and not to exceed in any calendar month the full salary of said police justice for that month.

Clerk.

SEC. 20. The Board of Aldermen of the City of Asheville are authorized to appoint and employ a clerk for said poilce court. and to fix his salary for the same. Said Board of Aldermen are also authorized, in their discretion, to appoint a prosecutor for said police court and to fix his salary for the same, or it may in its discretion direct the corporation counsel of the City of Asheville to appear as prosecutor in said police court and to fix such additional compensation for said corporation counsel as to it may seem best.

Prosecutor.

Repeal.

SEC. 21. Chapter one hundred and nine of the Private Laws of the Session of the General Assembly for the year One thousand eight hundred and ninety-seven, being an act to provide for the appointment and the election of a police justice for the City of Asheville, be and the same is hereby repealed.

Repeal.

SEC. 22. That Sections twenty, twenty-one, twenty-two and twenty-three of Chapter One hundred of the Private Laws of One thousand nine hundred and one be and the same are hereby repealed.

Police justice's name.

229 SEC. 23. That Thomas A. Jones Esq. of Asheville, North Carolina, the present police justice of the City of Asheville, be and he is hereby appointed police justice of said Court, to hold his office until the second Tuesday in May, one thousand nine hundred and five, and said Thomas A. Jones, is hereby declared to be eligible to re-election to said office at the election for the city officers for said city in May, one thousand nine hundred and five.

Conflicting laws repealed.

SEC. 24. That all laws and clauses of laws and parts of laws, whether of a general or private nature, inconsistent with any of the provisions of this act, be and the same are hereby repealed.

In effect from 1st April.

SEC. 25. This act shall be in force and effect from and after the first day of April, one thousand nine hundred and five.

In the General Assembly read three times and ratified this 4th day of March, 1905.

230 *Evidence.*

U. S. Circuit Court. Filed Jul- 20, 1907. W. S. Hyams, Clerk.

Hearing in Habeas Corpus Proceeding, Before Judge Pritchard, Circuit Judge, in Matter of Arrest of J. H. Wood and O. C. Wilson for Violation of the Railroad Rate Law.

G. S. REYNOLDS, being duly sworn, testified as follows:—

Examined by Mr. RODMAN:

Q. You are the Police Justice of the City of Asheville, are you not?
A. Yes sir.
Q. And a practicing lawyer?
A. Yes sir.
Q. Please state whether or not on or about the 15th of July at the instance of J. B. Wells you issued a warrant against Mr. J. H. Wood and Mr. Graham?

Mr. MERRIMON: We object. It is immaterial, so far as we can see whether he issued the warrant at the instance of Mr. Wells or not. It's not pertinent to the investigation before your Honor now. This write says by reason of a warrant issued at the instance of a man named Harmon. Whether it was issued at the instance of Mr. Wells or not doesn't make any difference.

The COURT (to Mr. Rodman): On what theory do you offer this evidence?

Mr. RODMAN: The theory is that your honor has made an order directing the Southern Railway Company to pursue a certain policy pending an investigation by this Court. We propose, if we can to show that the Company has through its agents, pursued that policy. We propose further, if we can, to show that there is a settled policy on the part of certain parties to break up the orderly proceeding of this Court and by the continual issuing of warrants rendering the action of this Court nugatory.

The COURT: I will admit the evidence, and I can perhaps determine later its relevancy.

Exception by respondent. Exception allowed.

Stenographer reads question.

A. Upon Mr. Wells making the affidavit which is required,
231 I issued the warrant.
Q. Have you that warrant with you?
A. It's on the table, I can produce it.
Q. Where were you when it was issued?
A. My recollection is that I was in Wells' Cigar Store.
Q. Who was present?
A. I do not remember whether any one was present or not.
Q. Were you not in the office of the Asheville Citizen?
A. I was in the office that afternoon.
Q. Were you in there at the time the affidavit was made?

A. My recollection is, as I stated before, that the affidavit was made in Mr. Wells' Cigar Store.

Q. Was Mr. Wells in the office of the Asheville Citizen with you that afternoon?

A. I really don't remember. I don't think he was.

Q. Who else was present at the time the warrant was issued?

A. Present where? Wells' Store?

Q. Yes sir wherever it was?

A. I don't remember anyone being there at all.

Q. Did Mr. Wells show you the coupon he received at that time?

A. He at least told me he had one. I am not sure whether he showed them to me or not?

Q. At the time he made the affidavit, he told you he had a coupon that the railroad agent had given him in the usual form?

A. He told me, my recollection is, that he had four coupons given him by Mr. Graham.

Q. For the excess between the two and a quarter cents and the amount charged?

A. He didn't state for what, but he said he had it.

Q. He did not turn that over to you.

A. No, sir.

Q. That suit was dismissed on Wednesday morning?

A. The record will show, I think it was Wednesday morning.

Q. Did you consult with Mr. Wells before dismissing it?

A. I did not sir.

Q. Did you hear any evidence before dismissing it?

A. I did not.

Q. You dismissed it of your own volition?

A. I did sir.

232 Q. You did not undertake to have a hearing on that?

A. I did not.

The COURT: Was that after the Writ *of Habeas Corpus* had been issued?

A. The *Habeas Corpus* Writ I think was issued Tuesday evening.

The COURT: Did you have knowledge of that fact when you dismissed the proceeding?

A. I don't know that I had actual knowledge.

The COURT: Did you have constructive or any kind of knowledge?

A. Yes sir.

Mr. RODMAN: You will recall that on Tuesday evening I told you Judge Pritchard had issued an order for the writ and it would be served?

A. I understood you to say that he was preparing it. I don't know that you said he had issued it.

Q. Did you see the Chief of Police that evening?

A. Yes sir.

Q. Did he tell you that it had been served on him?

A. Yes sir.

Q. Then you did know Tuesday evening that it had been issued on, served on him?

A. Yes sir I suppose so.

Mr. MERRIMON: We object. Mr. Reynolds is Judge of a Court of competent jurisdiction. It seems to me not proper to put a Judge on the witness stand and ask him his reasons for what he did in a matter pending before him.

The COURT: I take it that it will be contended by the State at a later stage of this proceeding that this Court ought not to entertain jurisdiction of the matter inasmuch as the defendant would have the right to carry his appeal from the justice of the peace Court to the State Court and then to the Supreme Court and in view of the fact that these writs are only issued in exceptional cases, I think it is my duty to get all the facts in this transaction.

Mr. RODMAN: Mr. Reynolds, what time Wednesday evening was it the writ in the Harmon case was issued?

A. My recollection is it was about five o'clock.

Q. Where were you when that affidavit was signed?

A. I was in the store of Mr. J. B. Wells.

Q. Who was present besides yourself and Mr. Marmon?

A. Mr. Wells was in his store.

Q. Had you seen Mr. Harmon at any time during the day
233 prior to the filing of that affidavit?

A. That's the first time I ever remember seeing Mr. Harmon, specially to recognize him.

Q. Had you been in conference with Mr. Wells during that Wednesday prior to the issuing of that affidavit?

A. I wasn't in conference with him, I had spoken to him once or twice.

Q. Had you talked to him about dismissing his case?

A. No sir, I had not.

Q. Did you inform him that it was dismissed?

A. Yes sir, I think I did.

Q. When and where?

A. I couldn't say sir. I don't remember.

Q. Was it in Mr. Wells' store?

A. I cannot say sir, because I saw Mr. Wells outside of the store.

Q. At the time you told him the case in which he made the affidavit had been dismissed, when you told him it had been dismissed, did you give him any reason why it was dismissed?

A. I did not sir.

Q. How did you happen to be in Mr. Wells' Store at the time Mr. Harmon made this affidavit?

A. I don't remember, I suppose I went in to buy cigarett-s or a cigar. That's where I buy all my goods.

Q. Did Mr. Wells say anything to you about Mr. Harmon desiring to make an affidavit?

A. I don't remember whether Mr. Wells mentioned it first but he was there, and it was spoken of.

Q. As a matter of fact did not Mr. Wells mention it first before Mr. Harmon said anything about it?

A. I was introduced to Mr. Harmon, I don't remember who mentioned it.

Q. Did not Mr. Wells send for you to come to his store?

A. He did not.

Q. Did not Mr. Wells or someone, notify you that Mr. Harmon, or someone would be there to make an affidavit?

A. They did not sir.

Q. Did you write out the affidavit at that place?

A. I did sir.

Q. Do you carry them around in your pocket?

A. I signed warrants—I have no particular place.

Q. Do you carry them around usually in your pockets?

A. I usually have some in my pocket.

234 Q. Did you have one in your pocket that day?

A. I did sir.

Q. Mr. Reynolds, when did you know, at what time during the day Wednesday, that Judge Pritchard, had left, or intended to leave the city of Ashville?

A. I heard it about three o'clock, I think sir, between two and three.

Q. Did you not state that evening that Mr. Wood and Mr. Graham and some other agent or some agent of the Southern Railway would be arrested again either that night or the next morning?

Mr. MERRIMON: I desire to protest again. This seems to me to be going entirely to- far. Mr. Reynolds is not required, as I can see to answer these questions. He is not required to give the reason for any acts of his as a public official. His position is entitled to as much respect as any court in the country. I don't think an inquiry of this kind is proper I object to it and I protest against it. I don't think he is required to give a reason, or answer questions of this character.

Judge MOORE: If it please your honor, as I understand it, the gentleman who has just taken his seat doesn't represent this witness he is our witness and he is making no protests against answering it, but I understand the gentleman represents the State of North Carolina. The witness is making no protest, *je* is our witness; we subpœnaed him and brought him here and we think as your Honor states, that this whole matter ought to be heard and now investigated and see how this transaction originated.

Mr. CARTER: I am here as a representative of Mr. Reynolds at his request and *has* his friend and attorney, and I concur in the protest by Mr. Merrimon that this examination of Mr. Reynolds is not warranted. We believe it a great injustice to Mr. Reynolds. We believe he cannot be required to go into reasons that actuated him in the discharge of his duties as a court under the laws of North Carolina, and therefore he can't be required to answer ques-

235 tions the evident purpose of which impeach him and very probably to lay the foundations for some proceedings against him for contempt of this Court, as these last questions would indicate.

The COURT: Does he stand on that right? Does he invoke that rule?

Mr. CARTER: As his attorney, I want to state to the Court that —

do advise him to invoke his rights under the Constitution of North Carolina.

The COURT: If you invoke that rule he can't be required to answer anything that would intimidate him.

Mr. RODMAN: If your honor please, I have not asked Mr. Reynolds a single question as to his reasons why *his* dismissed any warrants. I especially refrained from that. I simply asked him as to his acts and what he said while he was not on the bench. I recognize well the principles that if a witness states that an answer to a question would tend to incriminate him he has a right to decline to answer, and whenever Mr. Reynolds, as a practicing lawyer, states that his answer tends to incriminate him in any way, then I will withdraw the question.

Mr. MERRIMON: It is not a question of incriminating him. He is a judge and you have no more right to put him on the stand and subject him to such examination than you have to bring Judge Long here.

The COURT: Not as to anything he did in his judicial capacity.

Mr. CARTER: That — all we are objecting to.

The COURT: I sustain you on that and certainly won't require him to state anything that might incriminate him in contempt proceedings.

Mr. CARTER: I am not seeking to protect him from criminal prosecution, but evidently the purpose was to show that he has acted in contempt of this court, and he has a right to protect himself from that the same as any other person.

The COURT: I rule in your favor on that.

Mr. RODMAN: Mr. Reynolds, the next morning after this warrant was issued you had a trial?

A. Which warrant?

236 Q. The Harmon warrant?

A. Yes*s* sir.

Q. Have you that warrant present?

A. Yes sir, it is here in the Court.

Q. Mr. Harmon went on the witness stand, I believe?

A. He did sir.

Q. Did he produce a coupon?

A. He did sir.

Q. Is this it (showing witness paper)?

A. That's it.

Q. Is this the answer that was filed?

A. That's it sir.

Q. So this is the warrant and the coupon that was offered in evidence?

A. That's it, sir.

Q. You held did you not, that the coupon was all that was necessary to show the offence?

Mr. CARTER and Mr. MERRIMON object.

The COURT: I don't think you can attack the judgment.

Mr. RODMAN: I am not asking his reason. I am asking his conclusion of law. I am asking this as to what he ruled was the law, not why he ruled it, but what he ruled was the law. I am not asking his motive or his reasons, but simply what he ruled to be the law of the land in his Court.

Mr. CARTER: I am speaking in behalf of the witness and representing him in his capacity as a court. I submit that his rulings upon the law are not legitimate subjects of inquiry in *habeas corpus* proceedings. They can't inquire whether he had sufficient evidence before him or whether his rulings were correct or incorrect.

The COURT: I don't think it is Mr. Rodman.

Mr. RODMAN: Then Mr. Reynolds, you rendered your judgment?

A. Yes sir.

Q. You found those men guilty of selling transportation——

A. From Asheville to Canton——

Mr. MERRIMON: We object to anything about the judgment. The record speaks for itself. They can't attack it collaterally.

Mr. RODMAN: I am not attacking it collaterally.

Mr. MERRIMON: You can't even inquire into it.

Mr. RODMAN: Then you rendered your judgment?

A. I did sir.

237 Now, if your Honor please, we offer the affidavit made by T. J. Harmon and the coupon that was introduced as evidence in that case.

Mr. Merrimon objects.

The COURT: I don't know what it is, I would have to hear it before I know.

Mr. MERRIMON: What is the purpose of introducing this coupon?

Mr. RODMAN: I want to show that the offense was an act committed under and by virtue of the decree of this Court that he is being charged with. I am obliged to show that. It is the very ground of the petition.

The COURT: I will permit you to show that.

Exception by respondent. Exception allowed.

Mr. RODMAN: We offer the affidavit and warrant issued on the 18th day of July, 1907, together with the return. We offer the answer filed by the defendant in that case to show that the defense was set up in that cause, that they were acting under a decree of this court. We next offer the coupon which was used in evidence upon the trial. I will read it.

(Reads.)

We next offer the judgment and the mittimus.

238 J. B. WELLS, being duly sworn testified as follows:

Examined by Mr. RODMAN:

Q. You live in Asheville, I believe?
A. Yes sir.
Q. You swore out a warrant against Mr. Wood and Mr. Graham?
A. I believe their names were in the warrant.

Mr. MERRIMAN: We object as entirely collateral. That has nothing in the world to do with the case.

Mr. RODMAN: That is not with a view to attacking the judgment, but for the purpose of showing the number of prosecutions that have been or may be instituted.

The COURT: The Court would like to know about the matters thoroughly.

Exception by respondent. Exception allowed.

Mr. RODMAN: You were in the office of the Asheville Citizen at the time it was sworn out?
A. Yes sir.
Q. Mr. Reynolds was there?
A. Yes sir.
Q. Mr. Jones was there wasn't he?
A. No sir.
Q. Who else?
A. Mr. Cain, I remember.
Q. What Cain?
A. The editor of the Citizen.
Q. James H. Cain? Did you go from your office to the office of the Citizen with Mr. Cain?
A. No sir.
Q. Who went with you?
A. I don't remember whether I was by myself or not when we met. There's hardly a day passes that I don't go to the Citizen.
Q. Was Mr. Jones with you?
A. No sir, I didn't see Mr. Jones.
Q. Who else was there?
A. Well, there were people going in and out. It was in the editorial rooms, and people were passing in and out, I think, but who they were, I couldn't say.
Q. Where were you? What part of the room? At a desk, or where were the warrants sworn out?
A. I think I simply stood in the door in the office there talking.
Q. In the private editorial room.
A. Yes sir.
Q. With Mr. Cain?
A. Yes sir.
Q. And Mr. Reynolds?
A. I think possibly Mr. Reynolds. He was there. I don't know whether he came in after I did or not. I don't remember?

239 Q. You went there for the purpose of having the warrant sworn out?

A. I couldn't say that.

Q. Had you discussed the swearing out of the warrant before you went there?

A. I don't remember ever having mentioned it only as in conversation in the store. There have been a number of conversations in the store by different people in regard to swearing out warrants,—a number of them, and there has been and is every day so much talk that I can't remember distinctly the instances.

Q. Were any of these conversations with Mr. Reynolds or Mr. Cain in your store?

A. I never remember of talking with Mr. Cain about this matter except at this particular time.

Q. Were you sent for to go to the office of the Asheville Citizen?

A. No sir, not that I know of. If I was, I didn't get the word.

Q. How did you happen to go there?

A. As I say, I go there nearly every day. I pass there about six times a day.

Q. How did you happen to go into the private editorial room?

A. I frequently do that. Hardly a day passes that I am not in there.

Q. Was Mr. Reynolds in there when you first went in?

A. That I couldn't say.

Q. Let me ask you if you didn't say to Mr. A. S. Guerrard that you went from your office to the Asheville Citizen with some one, and that you had been sent for?

A. No sir. If I said anything of that kind, I never remember saying it. Mr. Guerrard and I were in the store together this morning after I saw you and I have tried to refresh my memory of every detail. I remember on the morning of the trial Mr. Guerrard was in the store, as he is frequently, and we walked from the store, I think to the Court room and he says that I made some statement about Mr. Reynolds or somebody about going in the Citizen office. That I haven't the slightest recollection of.

Q. You won't say that Mr. Reynolds didn't send for you?

A. I didn't get the word if he did.

Q. Who suggested the swearing out of the warrant when you were in the office of the Asheville Citizen?

240 A. I don't know that anyone suggested it. It was in a conversation, and something was said about a warrant and in the course of conversation, in the course of time, I was there and I signed the warrant. I think someone suggested something about making a test case of it and having a warrant.

Q. To make a test case.

A. Yes sir.

Q. That was Mr. Reynolds, wasn't it?

A. I couldn't say that.

Q. Or was it Mr. Cain?

A. I couldn't say it was.

Q. You know it must have been one of them?

A. Oh yes, it was one of them possibly.

Q. You wouldn't undertake to say which one? You were present

in Asheville on the 26th, 27th, 28th, and 29th of June weren't you, of 1907.

A. I think I was.

Q. You knew a suit had been instituted by the Southern Railway Company against the corporation commission to enjoin the passenger rates?

A. Only by heresay.

Q. You read it in the newspapers, didn't you.

A. No sir.

By the COURT: You are not represented by an attorney here?

A. No sir.

The COURT: I deem it my duty to say to you that you are not required to answer any question that would incriminate you in contempt proceedings.

Mr. MERRIMON: I would like to ask if this investigation has any bearing upon the case, or if it is simply an investigation in regard to his conduct. Has it got anything to *fo* with the Harmon case? If it has, I fail to see it so far.

Mr. RODMAN: Did Mr. Reynolds or Mr. Cain either one refer in your presence, that day or at any other time, to the order Judge Pritchard had made?

A. He did not. Neither of them, they never said anything to me about it.

Q. Did they ever mention anything about the suit by the railroad company?

A. Not that I know of to me.

Q. You are a newspaper dealer?

A. Yes sir.

Q. Mr. Caine, is a newspaper editor?

A. Yes sir.

Q. You sell his paper—you read it don't you?

A. Occasionally. The fact of the business is, I don't pay
241 very much attention to newspapers. I—don't have time.

Cross-examination by Mr. MERRIMON:

Q. Did you buy a ticket from the Southern Railway upon which the warrant was based?

A. Yes sir, I bought three. I paid $3.25, for three tickets to Turnpike.

Q. What would have been the fare at 2¼ cents?

A. I couldn't tell you.

Q. How far is Turnpike?

A. Fourteen miles.

The COURT: They gave you a coupon for the difference, didn't they?

A. Oh yes.

Mr. RODMAN: The first warrant was dismissed.

A. Yes sir.

Q. Without your knowledge?

A. Yes sir.

Q. The next day did anyone go to you and try to get you to swear out another warrant?
A. They did not.

242 J. H. WOOD, being duly sworn, testified as follows:—

Examined by Mr. RODMAN.

Solicitor BROWN: Judge Reynolds in testifying a while ago, made a mistake as to the place where the Wells warrant was issued. He wishes to correct it.
The COURT: Certainly Mr. Reynolds may make any statement.
Mr. REYNOLDS: My recollection is that the warrant was signed by Mr. Wells in the Citizen office.

Examination of Mr. WOOD by Mr. RODMAN:

Q. Mr. Wood you are the City Passenger Agent here?
A. District Passenger Agent.
Q. Mr. Wilson is passenger Agent where?
A. Depot Ticket Agent.
Q. You have charge of the *same* of tickets in Asheville?
A. Yes, sir.
Q. He is under you, I believe?
A. Yes, sir.
Q. Mr. Wood, since July 1st, have you sold any tickets at a rate greater than 2¼ cents without attaching thereto a coupon, such as was ordered by the Court to be attached?
A. Not in intrastate business.
Q. Have any been sold by any of your force to your knowledge or by your consent.
A. No, sir.
Q. Do you know from the reports about how many tickets are sold in intrastate business by the Southern Railway Company in North Carolina during a year?

Mr. MERRIMON: I don't think that has anything to do with it?
The COURT: I think it is very material you may take an exception if you desire.
Exception by respondent; exception allowed.

A. Over a million and a half.
Q. About 5000,000 a month is it?
A. Yes, sir.
A. About 5,000 a month?
The COURT: You mean tickets?
Mr. RODMAN: 5,000 tickets a month 5,000 a day. I should have said. Mr. Wood, were you present at the hearing of this
243 case when the warrant was issued on the affidavit of Mr. Harmon?
A. I was one of the defendants.
Q. You were present?
A. Yes, sir.

Q. Please state what Mr. Harmon said on the trial about the sale of the ticket and where it was to and whether or not he received a coupon.

Mr. MERRIMON: We object. I don't think it's proper to go into any evidence introduced on that trial.

The COURT: You have shown the coupon.

Mr. RODMAN: Yes, sir.

The COURT: You have indentified it as being the coupon on which the proceeding was instituted?

A. Yes, sir.

The COURT: Why go into it any further?

Mr. RODMAN: All right, sir, examine him gentlemen.

Cross-examination by Mr. MERRIMON:

Q. Have you sold any tickets since the 1st of July for 2¼ cents?

A. I have sold them for less than 2¼ cents. I don't remember whether there were any at exactly that rate.

Q. Regular transportation tockets?

A. Yes, sir.

Q. You charged Mr. Harmon, more than 2¼ cents for his ticket?

A. The rate prescribed by law, is more than 2¼ cents.

Q. Did you charge Mr. Harmon more than 2¼ cents for the ticket you sold him?

A. Yes, sir.

Q. How much more?

A. The difference between 2¼ and about 3 cents.

Redirect examination by Mr. RODMAN:

Q. That difference is what is represented by this coupon that was offered in the evidence up there?

A. Yes, sir.

Q. You didn't sell this particular ticket at all?

A. I did not, sir.

Solicitor Brown objects.

By Mr. MERRIMON: Did you sell this ticket?

A. I did not.

244 Solicitor BROWN: I object, it makes no difference whether or not he is guilty of this offense. The only question is, whether or not this Court has jurisdiction. His remedy is an appeal to the Superior Court and not by *Habeas Corpus*. The only thing to be determined is whether or not this Court has jurisdiction.

The COURT: Let's get down to the question involved in this case.

O. C. WILSON, being duly sworn, testified as follows:

Examined by Mr. RODMAN:

Q. You are one of the petitioners here. You were present at this trial before Mr. Reynolds, the Police Justice?
A. Yes, sir.
Q. Did you sell this particular ticket?
A. Well I was selling, at the time, I suppose I did.
Q. It was testified that you did sell it. Did you charge more than 2¼ cents?
A. Yes, sir.
Q. Did you give a coupon for the difference?
A. Yes, sir.
Q. You were acting at that time under the order of this Court?
A. I was.

Cross-examination by Mr. MERRIMON:

Q. Did you ever see the order of this Court?
A. Yes sir.
Q. When?
A. I think I had one or two.
Q. Did you ever read it?
A. Yes sir.
Q. Wasn't you acting under the instructions of some official instead of the order of Court?
A. No sir.
Q. When did you see this order, and how did you happen to see it?
A. I believe there was one or two sent to me at the office.
Q. Who by?
A. By Mr. Tayloe.
Q. Did you read them?
A. Yes sir.
Q. What did they say?
A. I can't tell you all they said.
Q. You were acting under the order of the Court in making the sale of tickets, and not the orders of the Railroad Company?
A. It was an order of the Court given down to me by the officials of the Railroad.

245 A. S. GUERRARD, being duly sworn testified as follows:—

Examined by Mr. RODMAN:

Q. Did you have any conversation with Mr. Wells about the warrant he swore out?
A. I did.
Q. When was it?

Mr. Merrimon Objects.
The COURT: What objections do you make?
Mr. MERRIMON: That it is immaterial and has nothing in the

world to do with the question. We are here required to answer a *Habeas Corpus* where the two prisoners, Wood and Wilson, are detained by a mittimus on a warrant sworn out by a man named Harmon. They were convicted and sentenced to the public road and I don't see where any conversation had with Mr. Wells has anything to do with the case.

Exception by respondent. Exception allowed.

A. The conversation took place on Tuesday morning, the 16th of this month, about 20 minutes to 9.

Q. In the City?

A. Yes sir.

Q. What was it?

A. Mr. Wells told me—We were speaking of the w-rrant. I stopped in there on my way to the Police Court. He told me the evening before he was approached by Judge Reynolds——

Mr. MERRIMON: Was Mr. Raynolds present at the time of this conversation?

A. He was not.

Mr. Merrimon objects.

Exception by respondent. Exception allowed.

Mr. RODMAN: Go ahead.

A. And that Judge Reynolds asked him, if he hadn't recently been on a trip to Turnpike, and he told him he had. He asked him how much he paid for his tickets and he told him how much. He then asked him if he (Wells) would make an affidavit to that effect and he told him he would, and together they went to the office of the Asheville Citizen where the affidavit was made.

By Mr. MERRIMON: What position do you occupy?

A. Law Agent, of the Southern Railway.

Q. How did you happen to engage in this conversation?

246 A. It was simply a personal conversation. I stopped in his store and the topic came up.

Q. Who brought it up?

A. I don't remember whether I brought it up, or Mr. Wells.

—— GRANT, being duly sworn testified:

Examined by Mr. RODMAN:

Q. Do you know G. S. Reynolds, the Police Justice?

A. I do.

Q. Did you have any conversation with him on Wednesday evening, as to whether or not a new warrant would be issued and the parties arrested?

A. On Wednesday evening about half past 6——

Mr. Merrimon objects.

The COURT: What do you offer this for?

Mr. RODMAN: I want to show it is the settled policy of the parties issuing these warrants to obstruct the decree of this Court.

Mr. CARTER: On behalf of Mr. Reynolds, it seems to me that it is

either an attack upon the conduct of a judicial officer. Mr. Reynolds can't reply to it——

M. RODMAN: All right, come down (witness withdrawn).

247 Mr. RODMAN: If your Honor please *pm* yesterday I only had with me the certified copy of the original bill, the decree and the writ of injunction, and I did not then know that the other papers in the case were present in the City of Asheville. I now ask leave of the Court to introduce the other papers introduced at the other hearing before your Honor, including the affidavit and answer.

The COURT: Oh yes.

Mr. MERRIMON: When were they filed here?

Mr. RODMA-: They were not filed here at all, bur they happen to be here for the use of the Judge. I didn't know it at the time.

Mr. MERRIMON: When were they filed at all?

A. At the original hearing June 26th.

Mr. MERRIMON: I mean the Ancillary Bill.

Mr. RODMAN: Last Monday, If your Honor please, I desire to offer copy of the News and Observer dated Tuesday Morning July 16th, containing letter from R. B. Glenn, Governor of North Carolina, to the Judges of the Superior Courts of the State, showing a settled policy to obstruct the jurisdiction of the Court.

Mr. MERRIMON: We object on the ground that it is not relevant. As I understand the question before this Court now is the discharge of two persons who were convicted in the police Court of this City charged with violation of the rate bill. I understand that to be the only question before this Court. I cannot understand how this testimony can be competent.

The COURT: There is one view of the case in which it may become competent. I will admit it.

Exception by respondent.

Exception allowed.

Mr. RODMAN: I offer copy of the Asheville Citizen of this morning showing the action of the Superior Court of Wake County in the case of State against T. E. Green and Southern Railway Company pending in the Superior Court of Wake County, for the same purpose.

Mr. MERRIMON: What is the purpose? I didn't understand the purpose.

248 Mr. RODMAN: The purpose is to show a settled policy on the part*y* of certain parties to obstruct the jurisdiction of this Court.

Mr. MERRIMON: There is no allegation made.

The COURT: Have you anything further to offer.

Mr. RODMAN: No sir.

The COURT: Have you anything to offer, Mr. Merrimon?

Mr. MERRIMON: No sir.

J. H. Wood, having been duly sworn, testified as follows:

Examination by Mr. J. G. Merrimon:

Q. Did you take an appeal from the judgment rendered by Judge Reynolds?
A. Did I take an appeal?
Q. Yes, sir. Did you appeal from his judgment to higher court?
A. No sir.
Q. Why not?

Objection by Mr. Rodman on the ground that why he didn't appeal is immaterial.

Judge Moore: We suspect he was advised by counsel. I expect that is about the way of it.

Mr. Merrimon: The purpose is this: The statute authorizing and creating Judge Reynolds' Court provides for appeal and provides for bond pending appeal, and the answer alleges that he could have given a bond and took appeal and his rights could be protected. We want to show that it was the settled policy not to take an appeal and have the case heard in this way.

The Court: I take it that for the purposes of this hearing it might be admitted that he would be entitled to an appeal.

Mr. Rodman: There is no question. The statute so provides. The statute is in.

Mr. Merrimon: I ask him, then, if he couldn't give any reasonable amount of bond?

Mr. Rodman: We object to that.

The Court: I sustain that objection. It is immaterial.

Exception by respondent—exception allowed.

249 *Evidence.*

U. S. Circuit Court. Filed Jul- 20, 1907. W. S. Hyams, Clerk.

Mr. Rodman: If your honor please, we first offer a certified copy of the original bill and the order made by your Honor and also the writ of injunction issued on that order in the Eastern District of the United States which bill was filed and decree or order made and injunction issued in the case of Southern Railway Company, Complainant, *v.* Franklin McNeill *et al.*

The Court: You intended to say Eastern District of North Carolina?

Mr. Rodman: Yes sir, the Eastern District of North Carolina. I also desire to offer the *answerary* bill and order signed by your Honor in the same case filed in the Western District at Asheville. We will next offer sir, Private Act of North Carolina, entitled an Act to establish within the City of Asheville a special Court to be called the Police Court, and prescribe the jurisdiction thereof, ratified the 4th day of March, 1905.

Mr. Merriman: What law is that?

Mr. Rodman: Private Laws of 1905, Chapter 35. I ask your

Honor to have sworn Mr. Reynolds, Mr. J. B. Wells, Mr. Harmon, Mr. A. S. Guerrard, Mr. Wood, and Mr. Wilson.

The COURT: Let the witnesses come around. (Witnesses sworn.)

250 *Motion by Respondent's Attorneys.*

We now interpose a motion, if there is any evidence here upon the question of the effect of this act upon the property of the railroad corporation, that if it tends to confiscate their property or to take their property or rights without due process of law, we move now to be allowed to continue this case and go into the evidence for the purpose of showing such thing to be the fact.

The COURT: Motion refused. Exception by respondent. Exception allowed.

251 *Bond.*

UNITED STATES OF AMERICA,
Eastern District of North Carolina:

Circuit Court at Raleigh, Fourth Circuit.

SOUTHERN RAILWAY COMPANY,
against
FRANKLIN MCNEILL ET AL.

Prosecution Bond.

Know all men by these presents, that we, Southern Railway Company, as principals, and Henry W. Miller, as surety, are held and firmly bound unto the defendant- in the above entitle- action in the sum of two hundred dollars, to the payment of which we bind ourselves firmly by the presents.

Sealed with our seals and dated this 9th day of May, 1907.

The condition of the above obligation is such, that whereas the plaintiff- in the above named cause has brought an action against the said defendants therein, now if the said plaintiff shall prosecute its said action with effect, or, in case it fail therein, shall well and truly pay all such costs as shall be awarded and recovered against the said plaintiff- in said action, then the above obligation is to be void, otherwise it is to remain in full force and effect.

SOUTHERN RAILWAY CO., [SEAL.]
By N. B. RODMAN. [SEAL.]
H. W. MILLER. [SEAL.]

Taken and acknowledged before me, this 9th day of May, 1907.

H. L. GRANT, *Clerk*,
By GEO. TONNOFFSKI, *D. C.*

UNITED STATES OF AMERICA, *Eastern District of North Carolina:*

H. W. Miller, being duly sworn, says: That he is the surety whose name is signed to the within undertaking; that he is a resident of, and has property within, the State of North Carolina, to the amount of Two Hundred Dollars, not exempt from execution, and in excess of his debts and liabilities.

H. W. MILLER.

Sworn and subscribed before me, this 9th day of May, 1907.

H. L. GRANT, *Clerk*,
By GEO. L. TONNOFFIKI, *D. C.*

Indorsed on back: No. 295. Equity. In United States Circuit Court/ Eastern District of North Carolina. At Raleigh. Southern Railway Co. Against Franklin McNeil *et al.* Prosecution Bond filed May 9th 1907. H. L. Grant, Clerk.

252 *Subpœna.*

UNITED STATES OF AMERICA, *Eastern District of North Carolina:*

Circuit Court at Raleigh, Fourth Circuit.

The United States of America to Franklin McNiel, Samuel L. Rodger, Eugene C. Beddingfield, Robert D. Gilmer and Hayden Clement, Defendants, Greeting:

We command you, and every of you, that you appear before the Judges of our Circuit Court of the United States of America, for the Eastern District of North Carolina, at the office of the Clerk of the said Court in the City of Raleigh, in said District, on the First Monday in the month of June next, to answer the Bill of Complaint of Southern Railway Company, citizen and resident of the State of Virginia, filed in the clerk's office of said Court, in said City of Raleigh, then and there to receive and abide by such judgment and degree — shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal/ of the Eastern District of North Carolina to execute.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Raleigh, in said District, the 9th day of May, 1907, and in the 131 year of the Independence of the United States.

Issued the 9th day of May 1907.

H. L. GRANT, *Clerk*,
By GEO. L. TONNOFFSKI, *D. C.*

253 Indorced on the Back.

Memorandum.

The within named Defendants are notified that, unless they enter their appearance in the Clerk's Office of said Circuit Court, at Raleigh, as aforesaid, on or before the day to which the within writ is returnable, the complaint will be taken against them, as confessed, and a decree entered accordingly.

H. L. GRANT, *Clerk*,
By GEO. L. TONNOFFSKI, *D. C.*

Marshal's Docket No. 295 Equity.

In United States Circuit Court, Eastern District of North Carolina, at Raleigh.

SOUTHERN RAILWAY COMPANY
against
FRANKLIN MCNEIL, SAMUEL L. ROGERS, ET ALS.

Equity Subpœna.
Returnable the first Monday in June 1907.
Original for Marshal's return.

CLAUDIAN B. NORTHROP,
W. B. RODMAN,
Solicitors for Complainant.

Received at Raleigh, N. C. May 9th 1907 and executed this day by delivering a copy of within Equity Subpœna to Franklin McNeil, Samuel L. Rodgers & Eugene C. Beddingfield, at their office, Raleigh, N. C., and on May the 10th, 1907, executed upon Robt. D. Gilmer and Hayden Clements by delivering a copy of within Equity Subpœna to Miss Sarah Burkhead, Stenograph- of said parties at office of Attorney General, Raleigh, N. C.

CLAUDIUS DOCKERY,
U. S. Matshal,
[SEAL.] Per P. A. MITCHELL,
Office Deputy Marshal.

Marshal's cost, $10.00.

Returned and filed May 10th, 1907.

H. L. GRANT, *Clerk.*

Office of U. S. Marshal, Raleigh, N. C. May 9, 1907.

254 In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
v.
FRANKLIN MCNEILL ET ALS., Defendants.

Knows all men by these presents that

Southern Railway Company, a corporation of the State of Virginia, the principal office of which is in the City of Richmond in said State, as principal, and The United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the defendants, Franklin McNeill, Samuel L. Rodgers Eugene C. Beddingfield, Robert D. Gilmer, and Hayden Clement in the just and full sum of Ten thousand dollars, for the payment of which well and truly to be made we do hereby jointly and severally bind ourselves, and each of our successors, firmly by these presents,

Sealed with our seals and dated this the 8th day of May in the year 1907;

The condition of this obligation is such that

Whereas a restraining order has been made it the above entitled case by the terms of which the defendants, and each of them, are restrained untill an application for an interlocutory injunction herein shall be determined, from doing or causing to be done, certain acts mentioned in said restraining order, now should said restraining order be dissolved or vacated as having been wrongfully issued, or because the said acts were improperly restrained, then, if the above named Southern Railway Company shall pay, or cause to be paid, all damages caused by the issue of the said restraining order, and the costs on this cause in connection therewith, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In testimony whereof the parties hereto have caused these *parents* to be duly signed in their respective names and their respect-
255 ive seals to be hereunto affixed, duly attested, this eight- day of May in the year 1907.

SOUTHERN RAILWAY COMPANY,
By A. B. ANDREWS, *First Vice President.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
[SEAL.] By E. LESLIE SPENCER, JR., *Attorney in Fact.*

Attest:
GEO. R. ANDERSON,
[SEAL.] *Assistant Secretary.*

Approved as a full compliance with the provision of the restraining order entered in this cause on the 8th day of May 1907, requiring the giving of a bond.
J. C. PRITCHARD,
U. S. Circuit Judge.

256 In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE SOUTHERN RAILWAY COMPANY, Complainant,

vs.

FRANKLIN MCNEIL, SAMUEL L. RODGERS, E. C. BEDDINGFIELD, A. D. GILMER, and HAYDEN CLEMENT, the First Three Constituting the Corporation Commission of North Carolina, and the said R. D. Gilmer Holding the Position of Attorney General of North Carolina, and the said Hayden Clement Holding the Position of Assistant Attorney General of North Carolina.

C. A. Reynolds, being first duly *srown*, says: That he resides in the State of North Carolina, County of Forsyth and has done so for many years: that he is largely interested in industrial plants and other concerns in that section of the State: that he is Vice President and director of The North Carolina Electrical Power Company. that he is familiar with the annual rate of interest charged upon money loaned in North Carolina, where the security is ample and sufficient, and that the said rate of interest for money loaned upon good security is six per cent., and he is informed and believes that many loans are made at a higher rate of interest that six per cent. he is familiar with what he considers a fair earning capacity for money invested in trade or industrial plants or manufacturies, and that where such business is conducted with the usual skill and with ecomeny that ten per cent. upon the money invested is a very low earning capacity; that he would consider ten per cent. a low earning capacity for money invested in an industrial plant where the same was economically operated and with usual skill.

C. A. REYNOLDS.

Sworn and subscribed to before me this the 21st day of June, 1907.

[SEAL.]

W. E. FRANKLIN,
Notary Public.

U. S. Circuit Court. Filed June 26, 1907. W. S. Hyams, Clerk.

257 In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE SOUTHERN RAILWAY COMPANY, Complainant,

vs.

FRANKLIN MCNEIL, SAMUEL L. RODGERS, E. C. BEDDINGFIELD, A. D. GILMER, and HAYDEN CLEMENT, the First Three Constituting the Corporation Commission of North Carolina, and the said R. D. Gilmer Holding the Position of Attorney General of North Carolina, and the said Hayden Clement Holding the Position of Assistant Attorner General of North Carolina.

John W. Fries, being first duly *srown*, says: That he resides in the State of North Carolina, County of Forsyth, and has done so for many years: that he is largely interested in industrial Plants and other concerns in that section of the State; that he is President and director of Arista Mills Company; that he is familiar with the usual rate of interest charged upon money loaded in North Carolina, where the security is ample and sufficient, and that the said rate of interest for money loaned upon good security is six per cent. He is familiar with what he considers a fair earning capacity for money invested in trade or industrial plant- or manufacturies, and that where such business is conducted with the usual skill and with eco*meny* that ten per cent. upon the money invested is a very low e-rning capacity: that he would consider ten per cent. a low earning capacity for money invested in an industrial plant where the same was economically operated and with the usual skill.

J. W. FRIES.

Sworn and subscribed to before me this the 20th day of June, 1907.

W. E. FRANKLIN,
Notary Public.

U. S. Circuit Court. Filed June 26, 1907. W. S. Hyams, Clerk.

258 In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE SOUTHERN RAILWAY COMPANY, Complainant,

vs.

FRANKLIN MCNEIL, SAMUEL L. RODGERS, E. C. BEDDINGFIELD, A. D. GLIMER, and HAYDEN CLEMENT, the First Three Constituting the Corporation Commission of North Carolina, and the said R. D. Gilmer Holding the Position of Attorney General of North Carolina, and the said Hayden Clement Holding the Position of Assistant Attorney General of North Carolina.

C. H. Ireland, being first duly sworn, deposes and says: That he is a resident of the City of Greensboro, State of North Carolina: that he is the General Manager and one of the officers of the Odell Hard-

ware Company, in the City of Greensboro: that he has resided in the said City of Greensboro for about twenty years. That he is also interested in many other enterprises in and around the said City of Greensboro and in the County of Guilford and elsewhere: that by reason of his position in the industrial world and in the world of trade, he is familiar with and knows the usual and ordinary rate of interest received and demanded upon money loaned upon good security in the section of North Carolina in which affiant lives: and that the usual and ordinary rate of interest is six per cent. That this affiant is familiar with what is considered a fair earning upon money invested in trade or upon money invested in industrial business or manufacturing and that this affiant would consider ten per cent. upon the capital stock or upon the money invested a very low average rate or earning for money invested in trade or manufacturies or commrese in that section of the State in which affiant lives, in which the business is economically operated and conducted with average skill, and this affiant knows of many instances where a rate of earning is much higher than ten per cent.

CHAS. H. IRELAND.

Sworn and subscribed to before me this 15th day of June, 1907.
[SEAL.] THOMAS P. HEALL,
Notary Public.

U. S. Circuit Court. Filed June 23, 1907. W. S. Hyams, Clerk.

259 In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE SOUTHERN RAILWAY COMPANY, Complainant,
vs.
FRANKLIN MCNEIL, SAMUEL L. RODGERS, E. C. BEDDINGFIELD, A. D. GILMER, and HAYDEN CLEMENT, the First Three Constituting the Corporation Commission of North Carolina, and the said R. D. Gilmer Holding the Position of Attorney General of North Carolina, and the said Hayden Clement Holding the Position of Assistant Attorney General of North Carolina:

R. P. Rankin, being first duly sworn, deposes and says: That he is a resident of Gaston County, State of North Carolina, and has been such for quite a number of years: that the said county has a large milling industry, especially in the manufacture of cotton. That he is Treasure- of Ozark Mills (Cotton Mills) and connected with several other cotton mills: that by reason of his position as a manufacturer of cotton, in which business — has been engaged for a number of years, he is familiar with the rates of interest charged in North Carolina upon money loaned, and is more or less familiar with what is considered a fair earning upon money invested in commercial and manufacturing industries, and in trade, where the said business is economically managed: that the usual rate of interest in

this affiant's section of North Carolina is six per cent. (6%) per annum. He is informed and believes loans are frequently made, carrying interest in excess of this amount. This affiant considers that an average of ten per cent. (10%) upon the money invested, either in trade or commercial industries is a low return for the use of such money, when the said industries are economically operated and managed with reasonable skill and prudence. This affiant is informed and believe- that there are many industries in North Carolina which are making more than ten per cent. (10%) upon the money invested.

R. P. RANKIN.

Sworn and subscribed to before me this the 20th day of June, 1907.

E. G. McLURD,
Notary Public.

[SEAL.]

My Commission expires July 26, 1907.

U. S. Circuit Court. Filed Jun- 26, 1907. W. S. Hyams, Clerk.

260 In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE SOUTHERN RAILWAY COMPANY, Complainant,
vs.
FRANKLIN MCNEIL, SAMUEL L. RODGERS, E. C. BEDDINGFIELD, A. D. GILMER, and HAYDEN CLEMENT, the First Three Constituting the Corporation Commission of North Carolina, and the said R. D. Gilmer Holding the Position of Attorney General of North Carolina, and the said Hayden Clement Holding the Position of Assistant Attorney General of North Carolina.

State of North Carolina, County of Forsythe, and has done so for many years: that he is largely interested in industrial Plants and other concerns in that section of the State: that he is President and director of Bailey Brothers, inc. that he is familiar with usual rates of interest charged upon money loaded in North Carolina, where the security is ample and sufficient, and that the said rate of interest for money loaded upon good security is six per cent., and he is informed and believes that many loans are made at a higher rate of interest than six per cent. He is familiar with what he considers a fair *eraing* capacity for money invested in trade or industrial plants or manufactories, and that where such business is conducted with the usual skill and with economy that ten per cent. upon the money invested is a very low earning capacity: that he would consider ten per cent. a low earning capacity for money invested in an industrial plant where the same was economically operated and with the usual skill.

M. D. BAILEY.

Sworn and subscribed to before me this the 20th day of June, 1907.

[SEAL.] D. RICH,
Notary Public.

My commission expires Oct. 12, 1908.

U. S. Circuit Court, Filed Jun. 26, 1907. W. S. Hyams, Clerk.

261 In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE SOUTHERN RAILWAY COMPANY
vs.
FRANKLIN MCNEIL, SAMUEL L. ROGERS, E. C. BEDDINGFIELD, A. D. GLIMER, and HAYDEN CLEMENT, the First Three Constituting the Corporation Commission of North Carolina, and the said R. D. Gilmer, Holding the Position of Attorney General of North Carolina, and the said Hayden Clement, Holding the Position of Assistant Attorney General of North Carolina.

L. L. Jenkins, being first duly sworn, deposes and says: That he is President of the First National Bank, situated in the town of Gastonia in the County of Gaston: that said County of Gaston is one of the largest cotton mill manufacturies in the south. That there are more cotton mills situated in Gaston County then in any one County in the State of North Carolina, and more, as he is informed and believes, than in any other county in the South. That by virtue of his position as President of the said Bank, he is familiar with the rate of interest charged upon loans made in North Carolina. That the rate of interest fixed by law is 6%; that by reason of his position he is familiar with the various industries in Gaston County, and especially the cotton mill industry, and he is familiar with the manufacturing industries in this section of the state and, according to affiant's best judgment, the return on capital invested in North Carolina in industries which are economically operated and managed with fairly reasonable skill, will average over ten per cent. (10%) and in many instances running as high as fifteen or twenty per cent., or even higher. That he is also familiar with the returns upon capital invested in industries generally, and in trade in his section of the State, and he will say that, according to his best judgment and belief, an average of (10%) ten per cent. is a low average return upon money invested, either in street or commercial, industries in North Carolina, where the same are economically
262 operated and with fair skill.

L. L. JENKINS.

Sworn and subscribed to before me, this the 20th day of June, 1907.

[SEAL.] E. G. McLURD.

U. S. Circuit Court. Filed Jun. 26, 1907. W. S. Hyams, Clerk.

263 U. S. Circuit Court. Filed Jun- 26, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
v.
FRANKLIN MCNEILL ET ALS.

The affiant, Chas. A. Wickersham, states that he is a resident of College Park, Fulton County, Georgia, and is President and General Manager of the Atlanta & West Point Railroad Company and the Western Railway of Alabama, with office in the City of Atlanta, Georgia.

Affiant states that he has had about twenty six years of railroad experience, part of which time he was employed on the Pennsylvania Railroad as telegraph operator; employed as train and chief despatcher on the Burlington; employed as train master on the Georgia Pacific; as Superintendent of the Alabama & Great Southern, and as president and General Manager of the Atlanta & West Point Railroad Company and the Western Railway of Alabama.

Affiant states that in the performance of his duties it has been necessary for him to consider, examine and determine questions affecting the transportation business upon the railways with which he has been connected. Affiant states, further, that he has given consideration and study to the relative transportation expense of local and through traffic. Affiant states further, that the large preponderance of what is known — "traffic" is interstate business,—that is, traffic mov- — points of origin and destination in different States; and that a large proportion of the State business is local traffic,—that is, traffic with points of origin and destination within one State, and that there is a close relationship between State and local business and between interstate and through business. Affiant states that the cost of operation of through and local business by the same engine and with the same number of cars, with same crew, is not the same, for various reasons, and that local freight trains cost more to handle than through freight trains with the same number of tons of freight the same number of miles; and that while it is somewhat difficult to intelligently state this difference in cost by reason of the revenue feature, as it is practically impossible to make a comparison of a freight train with through tonnage with a freight train with local tonnage, netting the same revenue, for the reason that a local freight train is from necessity compelled to handle considerable tonnage in the way of empty cars to and from local points to fill local orders, provision for which has to be made before leaving terminals. Affiant says, however, that from his knowledge and experience, his best judgment is that the average cost of handling a local freight train more than a through freight train with the same tonnage of the same number of miles would be about twenty two

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per cent. per mile greater. Affiant says that some of the items which make the handling of local freight trains more expensive than the handling of through freight trains are, in the first place, it is necessary to pay a higher rate of wages to enginemen and train crews; also, to provide one or more brakemen on local freight trains than is necessary on a through freight. A local freight train, taking longer to cover the same number of miles, than a through train, and doing switching at all stations, necessarily consumes more coal and
265 other train supplies than a through train. Again, the wear and tear on locomotives and cars in local service is much greater than in through service, for the reason that couplings have to be made and broken, switching service causes sudden and heavy strain and surges on locomotives and cars in making frequent and sudden stops and starting of train at each and every station, increasing largely the maintenance of equipment. Additional force must be employed to load and unload freight at the various stations, additional facilities in the way of storage rooms, tracks, etc., must be supplied, stationery and clerical force must be provided to make out bills of lading and way bills for each and every article shipped, and entries made at the delivering station and expense bills prepared, which consumes a great deal of time and requires large force. Practically none of this service is necessary in through or interstate business. Through trains are really made up at one terminal and run through to the other without stops other than for water and fuel and meeting and passing other trains. The expense incident to the constant stopping and starting of local trains is very great, as above stated, both in the wear and tear on equipment, and the increased liability to accident to employees and damage to equipment, as well as the merchandise which the car contains. To illustrate further—it is necessary to use great care at the terminal station in loading merchandise to see that it is correctly and safely packed in the car, that breakable articles are not loaded in close proximity to other articles which would be liable to damage same. When this car is opened at the first station, it is, of course, necessary to remove freight consigned to that station, which creates a vacant place in the car, allowing the other freight — shift, if the greatest care is not exercised, to its damage. Affiant states that they estimate their local claims on A. & W. P. R. R. and W. R. of A. to be twenty per
266 cent. greater than on business which they consider very conservative. Frequently truck and train hands, in removing freight, break same, notwithstanding the fact that they exercise as much care as possible, under the circumstances.

Affiant says, further, that the opinion as given above in this affidavit as to the greater cost of State or local business over through or interstate business is based upon the assumption that each train, both State and interstate, has the same tonnage and nets the same revenue. But this assumption is rarely, if ever, correct; and that his experience and observation show that the through or interstate train almost always carries a greater tonnage and produces a greater revenue than the local or State train. Affiant says, taking into consideration the revenue produced by the through or interstate trains

as compared with the revenue produced by the local or state trains, that the cost of doing the State or local business is very much greater in proportion to earnings than the cost of doing the through or interstate business. In fact, affiant is of opinion that in proportion to revenue the cost of doing the State business is several times as much as the cost of doing the interstate business. And further affiant saith not.

CHAS. A. WICKERSHAM.

Subscribed and sworn to before me by Chas. A. Wickersham this 11th day of June, 1907.

W. MOULTRIE HITT, JR.,
Notary Public, Fulton Co., Ga.

267 In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
v.
FRANKLIN MCNEILL ET AL., Defendants.

Affidavit.

L. F. Sullivan being first duly sworn, deposes and says:

I am Comptroller of the Chesapeake and Ohio Railway Company, and as such have charge of the accounts and books of the Company, having occupied that position since November 15, 1897. I have had about thirty-four or thirty-five years experience in the railroad business. I began in the railroad service in March, 1872, at the Indianapolis, Indiana, freight station of what was then known as the Indianapolis, Cincinnati and La Fayette Railroad, now commonly known as the Big Four, and remained there until 1880, occupying various clerical positions, including the position of Chief Clerk. In September, 1880, I was appointed Freight and Ticket Agent of the same company at Sheldon, Illinois, and remained there until November, 1881, when I was appointed Freight and Ticket Agent of the same company at Kankakee, Illinois, and remained there until June, 1882. In June, 1882, I was appointed Paymaster and Travelling Auditor, with headquarters at Cincinnati, and occupied the dual position until 1888. In the meantime, in March, 1886, I was app-inted Superintendent of Agencies of the same company, in charge of the local freight and passenger business,
268 and the appointment of agents on the line. In April, 1888, I was made Freight and Ticket Accountant of the same company, and remained in that position until July 1, 1889, when I was made Auditor of the Chesapeake and Ohio Railway Company; and on November 15th, 1897, was made Comptroller, which position I have occupied since that date.

I have given a great deal of consideration to the question of the comparative cost of doing local business with the cost of doing all the business of a railroad, and, while in my opinion it is impossible

to state such cost accurately I think it is possible to arrive at safe minimum of such cost. Unquestionably the cost to do local business is substantially greater than the cost to do the entire business of the company. My reasons for so thinking are principally, the increased wages paid employees in the local train service, the added cost of the additional employees in the local train service, the light loading of trains and cars engaged in the local service as compared with the loading of those engaged in the through train service, the shorter haul with lighter loads, or smaller density of traffic, of the local train over the through train, the additional station force required in the handling of the local traffic, the increased consumption of fuel and other train supplies in the local service, the increased cost for the loading and unloading of this class of traffic, and the increase in the maintenance of way and equipment expenses. In addition to this, the gross earnings of the through freight trains are very much larger than the earnings of the local freight trains, and I am convinced that the excess cost of doing local business over the
269 average cost of doing all business of a railroad company is conservatively stated at a minimum of fifteen cents to earn one dollar.

L. F. SULLIVAN.

Subscribed and sworn to before me this 14th day of June, in the year, 1907.

[SEAL.] COLUMBUS A. CANEPA,
Notary Public.

My commission expires Sept. 17th, 1907.

270 U. S. Circuit Court. Filed Jun- 26, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
vs.
FRANKLIN MCNEILL ET AL., Defendants.

Affidavit.

The affiant, A. H. Plant, being duly sworn, deposes and says:

That he is, and for some years past has been, Comptroller of the Southern Railway Company, and, as such, has supervision over its accounts, and charge of its books. That he has had a large experience in railroad accounting, and also in the practical handling at local stations of freight for transportation, including the loading, unloading, receipt, and delivery of such freights.

That he has already made an affidavit which has been filed in this case, in which it is stated that the operating cost, exclusive of taxes and improvements and betterments, to earn one dollar of in-

trastate revenue in North Carolina for the year ended June 30, 1906, was not less than 86.35 cents., it being further stated that, while it is impossible to state the exact cost to earn one dollar of intrastate revenue, it is certain that it cost much more to do so than the average cost to do all business, and at least the above mentioned figures, as this affiant verily believes.

The affiant further states that he believes, for the following
271 reasons, among others, that the cost to earn a dollar of intrastate revenue in North Carolina for said year was not less than the above mentioned minimum;

While the rates for local freight per ton per mile are generally higher than the rates per ton per mile for through freight, the revenue per train of local freight, notwithstanding the higher rates, is greatly less not only than the revenue per train from through freight, but also greatly less than the average revenue per train for all business. This follows from these considerations:

A through train is loaded at one terminal and runs through with little change of loading to at least one other terminal. In other words, with rare exceptions (such exceptions being due to an occasional car being put off at a junctional point or for some such reason), it hauls its whole load for the whole distance between terminals. This, therefore, gives to the train crew, to the engine, and to the equipment, a uniform and substantial use during the whole of the distance mentioned, and the lading being practically uniform, either to the full capacity of both engines and cars, or vastly more nearly so than in the case of a local train, the gross revenue return from such train is greatly more than the revenue return from a local train, which latter is used to do the work from station to station along the line of its run, and one or more cars may be unloaded of half their load at the first station out and run with this depleted load two or three stations further, when nearly the whole of it may be taken out, and run the balance of the way with an exceedingly small amount of freight. In other words, on a local train the process of unloading is going on at each station on the run, and statistics show that on local trains the maximum revenue or tonnage capacity of engines and cars is seldom, if ever
272 obtained, and that a very large percentage of the run is practically empty. This indicates, and statistics amply show, that the percentage of lading to the full capacity of a through train is very much greater for the full distance than the percentage of loading on a local train is for any considerable part of the distance, and, in addition to that, that the lading of the through train is practically maintained for the whole distance, and the lading of the local train, which is generally light, is constantly shifting, and, notwithstanding the fact of the amount of freight that may be picked up at intervening stations, does not give to the local train anything like the percentage of efficiency possessed by the through train. Moreover local trains are obliged to run at regular times every week day, on schedules, whether there is business to justify the starting of the train from the terminal or not, while, on the contrary, a through train starts out only when the freight is there

and ready to be carried. In addition to this, the actual cost incident to the movement of a through train is very substantially less than the actual cost of handling a local train. For example: A conductor on a through train is paid on the Southern Railway $3.18 for a hundred mile run, or eleven hours' work, whereas, a conductor on a local train is paid $3.80 for ten hours' work, and a run which is usually not over sixty to seventy miles; the through divisions on the Southern Railway, which is the unit of handling for the through trains, being divided up into shorter runs for the local trains. The above figures mean that the through conductor gets 29 cents an hour, whereas, the local conductor gets 38 cents an hour, and the distance covered by the through conductor is probably one and one half times as much as the distance covered by the local conductor. These figures as to conductors illustrate the scale of wages as to the other employees on the train. In addition to this,
the engine on a local train must be kept under steam, even
273 while it is standing at stations loading and unloading local
freight, and doing shifting work on the way, which means that the engine costs for fuel, oil, waste and other engine supplies are being consumed on the local train for the shorter distance to the same, if not to a greater, extent, as compared with similar costs on engines on through trains for the longer distance. Furthermore the pay of enginemen and trainmen continues during such stops on local trains, while the pay of enginemen and trainmen on through trains is utilized in earning revenues from continuous movements between termini. In addition to this, there are a larger number of men required to run a local train than there are to run a through train. For example: Two brakemen will run a through train, and together they will receive for the run $3.50, the rate being for the above mentioned one hundred miles, or eleven hours; whereas, it takes three brakemen on the local train who will together receive $6.45 for the local run of about sixty to seventy miles, or ten hours. It should be noted, also, that very much the larger proportion of the expense of local stations is due to the handling of the local business, such local stations not being much used for through business. The greater cost of doing local business as compared with through business is likewise caused to a substantial extent by the greater number of handlings that local freight is necessarily subjected to as compared with through freight. Through freight is usually loaded on cars by the consignor and unloaded by the consignee. Local freight is both loaded and unloaded, as a rule, by the company. Every time this freight is handled there is an actual cost for the handling, in addition to which there is an increased chance of injury, miscarriage and loss. Wherever there are many transfer
points, such as are especially numerous in the State of North
274 Carolina, the number of these handlings is increased, and the
consequent increased cost of handling and the consequent increased risk of loss, damage and miscarriage naturally follow. Moreover, at terminal points where trains are to be started to go through without change to another terminal point, it is possible to gauge with substantial accuracy the amount of labor that will be

necessary to perform the service, and to regulate such labor costs to the necessities of the work, whereas, at the local stations, the maximum amount of service must be permanently established and maintained, so that the maximum cost is continuing, whether the traffic justifies the cost or not. Taking all these matters (and others which might be mentioned), into consideration, namely, the actually larger revenue from a through train, the actually smaller cost of handling the through train as compared with the local train, the actually smaller expense of loading and unloading a through train as compared with a local train, the actually larger expense of handling local traffic as compared with through traffic, and the greater risk of loss, damage and miscarriage of local traffic, it is manifest to my mind, and I believe it to be generally accepted by those who have made a study of the subject, that the cost of doing local business is very much greater than the cost of doing through business.

The substantial characteristic of the intrastate business in North Carolina is that it is local business and done on local trains. While, of course, there are some exceptions to this, and some of it is handled on through trains, those exceptions are so small that they are negligible for the present purpose, and, for the purpose of considering the cost of doing the business, the intrastate business in North Carolina may be considered as substantially local business. The interstate business in North Carolina is made up of both local and
275 through but a very large proportion of it is handled on through trains. I am fully convinced that the cost of earning one dollar from intrastate, or local, business in North Carolina is at least nineteen or twenty cents more than the cost of earning one dollar on system business.

I arrive at this conclusion as to the minimum amount of such excess by comparison of a great many train movements and by an analysis of the expense incident thereto, and my firm belief is that this difference is much more than the fifteen cents used in my calculations submitted in my former affidavit in this cause, instead of less; in fact, the result of my experiments and observations establishes to my entire satisfaction the fact that this excess amounts, as above stated, to at least nineteen or twenty cents more to do intrastate business in North Carolina than the general System average. The general System average expense of doing business for the year ended June 30, 1906, without including anything for taxes or anything for betterments and improvements, even for those not capitalized, was 71.35 cents, and in making an addition of fifteen cents to this average I am convinced that I am making an addition less than the actual increase of expense to earn a dollar of intrastate revenue. In making this addition of a minimum of fifteen cents, and making the foregoing estimate of an addition of a minimum of between nineteen and twenty cents, I have borne fully in mind the difference in the rates, this difference in the rates being very much more than overcome by the larger train revenue on the average business of the company over the train revenue from the intrastate business in North Carolina.

The results stated in this affidavit have been reached after an earnest study and consideration of this subject recently made. The question of what the increased cost of doing intrastate business over other business of the company would amount to was
276 treated for several years in the accounting department of this company on the basis of a mere estimate, without thorough study or analysis, and reports which have been made to the Corporation Commission of North Carolina were merely upon an assumed basis, based upon what was allowed by the Supreme Court of the United States in the case of Smythe *v.* Ames, 169 U. S., where the court used the following language:

"That conclusion was based largely upon the figures presented by Mr. Dilworth, while he was secretary of the state board of transportation, as well as a defendant and one of the solicitors of the defendants in these causes. He was a principal witness for the board. His general fairness and his competency to speak of the facts upon which the question before us depends are apparent on the record. He stated that the average reduction made by the statute on all the 'commodities of local rates' was 29.50 per cent.; and this estimate seems to have been accepted by the parties as correct. He estimated that the percentage of operating expenses on local business would exceed the percentage of operating expenses on all business by at least ten per cent., and that it might go as high as twenty per cent., or higher. And this view is more than sustained by the evidence of witnesses possessing special knowledge of railroad transportation and of the cost of doing local business as compared with what is called through business. Indeed, one of these witnesses states that the cost of carrying local freight is four times as much as the cost of through freight per ton per mile; another, that the cost of the short haul is 'reasonably double the long haul.' If due regard be had to the testimony—we have no other basis for our judgment—we are not permitted to place the extra cost of local business at less than ten per cent greater than the percentage of the cost of all business."

As no account of the difference in such costs was kept upon the books of this company and no attempt made in the company's books to separate the cost between the interstate and the intrastate business, when called upon for statements of these expenses by the North Carolina Commission, such statements were necessarily made upon an assumed basis, with the statement that the results were approximate. And the basis assumed for these reports in North Carolina was the minimum amount stated in the decision above referred to of the Supreme Court of the United States in Smythe *v.* Ames, 169 U. S. Subsequent investigation and study of the situation and consultation with men of experience have con-
277 vinced me that the estimated basis used in the reports made to the Commission in North Carolina is entirely too small, and that the minimum should not be less than is given in this affidavit. In fact, when all the conditions are considered and all the elements of increased expense are given their due weight, I believe that the estimate given in this affidavit will be considerably

below what is the real cost of doing such business. It is impossible to arrive at such costs accurately, as there are many of the elements of the expense which are common to all classes of business, and a division of expenses thus common to all classes of traffic must be made more or less upon arbitrary lines. For example: The general expense of doing all the business of the Company cannot, with accuracy, be allocated as between the different classes of business, and the same is true of other elements of expenses, such as maintenance, but it is safe to say that a reliable minimum can be reached, and this minimum is not, in my judgment, after much consideration of the subject, less than that above mentioned. This estimate of a minimum makes no allowance whatever for any increased cost of maintenance due to the increased wear and tear on the roadbed and equipment incident to the more frequent starts and stops in connection with intrastate business.

In my judgment, it is impossible to approximate, with any confidence, the cost of doing passenger business separately from the cost of doing all business; but the above mentioned estimate of a minimum treats the business of the railroad as a whole, and includes passenger and freight revenue and revenues from other operating sources.

The earnings from passengers of passenger trains in North Carolina, embracing both interstate and intrastate passenger business, are less than one dollar per train mile, and it is the usually accepted opinion among railroad men that passenger train
278 which does not earn from its passengers more than a dollar per mile is not a profitable train, the general impression being that a passenger train earning less than one dollar per train mile from passengers is run at a loss. Whether this be actually true or not, I believe it to be certain that it costs to earn a dollar of every class of passenger train revenue, intrastate as well as interstate, more than the above mentioned figures of 86.35 cents.

A. H. PLANT.

Subscribed and sworn to before me this 10th day of June, in the year 1907.

[SEAL.] ALFRED H. OLIVER,
Notary Public.

279 The undersigned, being first duly sworn, state severally that they have had much experience in railroad accounting, and have given much consideration to the question of the difference in cost of doing local business over the average cost of doing all business of a railroad, and have given much study to the subject. They further severally state that they are convinced, from this study, and from their experience, that the cost of doing such local business over the average cost of doing all business of a railroad is very considerable, and, having read the within affidavit of Mr. A. H. Plant, state they they agree with his conclusions, and that the minimum of nineteen or twenty cents of additional cost to earn a dollar of local revenue over the average cost for the system, is, in their judgment,

entirely conservative, and that, in their opinion, such excess cost is greater, rather than less, than the amount mentioned in the said affidavit of Mr. Pla[illegible]

FRANK MAY,
General Auditor, C. R. I. & P. R'y Co.
ERASTUS YOUNG,
General Auditor, W. P. R. R. Co. and Southern Pac. Co.
CONF. KREB,
Comptroller, Illinois Central R. R. Co.

280 FRANK MAY.
ERASTUS YOUNG.
CON. F. KREBS.

STATE OF NEW YORK,
City of Buffalo, County of Erie, To wit:

Before me, Wm. A. Angus, a notary public in and for the City of Buffalo and the State of New York, came each of the persons whose names are above subscribed and subscribed and swore to the foregoing affidavit this 14th day of June, in the year 1907.

I certify that my commission as notary public expires on the 30th day of March, in the year 1909.

Given under my hand and official seal this 14th day of June, in the year 1907.

[SEAL.] WM. A. ANGUS,
Notary Public.

281 In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
vs.
FRANKLIN MCNEILL ET AL., Defendants.

The affiant, George B. Harris, states that he is president of the Chicago, Burlington & Quincy Railway Company with office at Chicago, Illinois, and that he has been in the railway service since 1866, with the exception of a short time, and during that period has had charge of various departments of railroad work and has had general charge of traffic and operating departments for some years last past, and has had occasion to consider various questions that arise in the operation of railroads, and among others the relative revenue arising from and the expense connected with the conducting of local and through traffic, by local traffic meaning, such as is picked up from or delivered to the intermediate local stations as distinguished from that to & from important terminals where it is handled in large volume and consequently at the minimum of expense.

Affiant further says that in his opinion the expense of receiving and delivering local business in the volume in which it is usually handled is at least three times as great as the expense connected with

the handling of through business and business between large or important points where, while the terminals are expensive, the volume of traffic is large and the facilities are such that the unit of expense is obviously much less than what may be termed the retail trade of local stations.

282 And further this affiant saith not.

GEORGE B. HARRIS.

Subscribed and sworn to before me this 18th day of June, 1907.

[SEAL.] J. H. PETTIBONE,
Notary Public.

283 U. S. Circuit Court. Filed Jun- 26, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
vs.
FRANKLIN MCNEILL ET ALS.

The affiant, Wm. H. Truesdale, states that he is the President of the Delaware, Luckawanna & Western Railway Company, with his office in the city of New York, N. Y.

He states that he has been engaged in the railroad service, in various capacities, for a great many years, and that he has made an extensive study and given extensive consideration to the various questions that arise in the operation of railways; and that the various positions that he has held, and the duties devolving upon him in those positions, have made it necessary that he should do so. He states that he has been connected with the Traffic Departments, Operating Departments, Accounting Departments, Treasury Departments, and has also had charge of maintenance. He states that he has given study to the question as to the cost of doing local business as compared with the cost of doing through business in comparison with the earnings on local traffic and the earnings on through traffic; and he states that, in his opinion, the expense of doing local business is much greater than of doing through business; and that, while it is somewhat hard to say what this difference is with any degree of accuracy, in his opinion a very conservative estimate of the difference in the expense of doing what is termed "local business" as compared with the expense of doing what is termed "through business"

284 is somewhere in the neighborhood of two or three times as much for the local as for the through; that there are many items of expense that enter into the handling of local business that do not enter into the handling of through business; and that the chief difference, in his opinion, is in the trains and carloads, that a through train can be loaded to the full capacity of the engine, and usually is, and is usually transported to destination—from beginning

to end—with a full load, while the local train, on the other hand, may start with a train full, which is very rarely the case, and, by the time it gets through its run, have practically nothing on the train, and *vice versa;* it may start with nothing and at the end of its run may have a full train; as a general rule, however, local trains run lighter over their entire run than through trains, and if you get an average of from one half to one third of the engine's capacity in the local train you are doing very well. He states that, in transacting the local business, the expense of switching and the risks incident thereto are very much greater than on the through train; that the handling of freight and the labor incident to it is much more in the local than in the through business; that the men handling local freight trains are paid necessarily more than those handling through trains, for the same distance run.

Affiant states, further, that, in his opinion, on a railroad where a large preponderance of the through business is interstate and only a small portion is state, and where a large preponderance of the state business is local and only a small proportion is through, that these facts, while they may to some immaterial extent reduce the excess cost of state business over interstate business, yet they will not do so materially and that, in such a case as just stated, in affiant's opinion, from his many years' experience and observation in the railroad service, the cost of doing state business is at least twice as much
285 as the cost of doing interstate business. And further affiant saith not.

W. H. TRUESDALE.

Subscribed and sworn to before me this 10th day of June, 1907.

[SEAL.] JOSEPH FULL,
Notary Public, New York County.

286 U. S. Circuit Court. Filed Jun- 26, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States, Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
v.
FRANKLIN MCNEILL ET AL., Defendant-.

Affidavit.

The affiant, J. M. Culp, being first duly sworn, states that he is Vice President of the complainant, Southern Railway Company, in charge of its traffic—freight and passenger; that during the year ended June 30th, 1906, and since, and for some years prior thereto, the said Southern Railway Company owned, operated and controlled lines of railroad which constituted the system known as the Southern Railway in the states of Virginia, North Carolina, South Caro-

lina, Georgia, Florida, Alabama, Mississippi, Tennessee, Kentucky, Indiana and Illinois, which said lines are continuous, except that it has no connection by rails owned by it between that part of its system lying in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi and Tennessee, and that part of the system lying in the states of Kentucky, Indiana and Illinois.

The affiant further states that the said Southern Railway Company owns, operates and controls 1,456.72 miles of railroad within the State of North Carolina, which form a part of the continuous system of the road of the said southern Railway Company lying in the states of Virginia, North Carolina, South Carolina,
287 Georgia, Florida, Alabama, Mississippi and Tennessee, and that it so owned, controlled and operated the same for some years last past, and in addition to intrastate business in North Carolina it does a large interstate business into and from said state and through said state and in and between all the other states aforesaid and other states of the United States, and also a large foreign commerce with other co-ntries.

The affiant further states that he is acquainted with the freight tariff of the Southern Railway Company as applicable to intrastate shipments within the State of North Carolina—as such freight tariff existed during the whole of the year ended June 30, 1906, and being the same which now exist-. The affiant states that none of the rates in said tariff are greater than the service performed, and none of them are in any respect unjust or unreasonable; to the contrary, the affiant states that many of said rates are unjustly and unreasonably low and that substantially higher rates than these would be both just and reasonable for the service performed, and in consideration of the property employed in such service, and said rates do not make a fair, just and reasonable return for the services performed in consideration thereof, and were fixed under conditions which have, since they were fixed, so changed as to make them no longer justly, fairly and reasonably compensatory to the said Southern Railway Company.

The affiant further states that he is well acquainted with the passenger tariff of the said Southern Railway Company for intrastate business in the State of North Carolina; that said passenger tariff—as it now exists,—is in no respect unjustly or unreasonable high nor greater than the service performed in consideration
288 thereof is justly and reasonably worth, and no greater than will return a fair compensation for the property employed therein.

The affiant further states that since said freight and passenger rates were fixed that the operating expenses of the said Southern Railway Company have largely increased; that it is compelled to pay more for the services of its employees and for the purchase of materials and supplies which are necessary to the operation of the railroad and keeping the same in good order and condition.

The affiant further states that there is no reason to believe that in the near future the amount of traffic—freight and passenger—

to be handled by said Southern Railway Company will be at all sufficient at the rates now charged to return to the Southern Railway Company a fair compensation for its property employed in the business of intrastate transportation within the State of North Carolina.

The affiant further states that if its said freight and passenger rates should be reduced as required by the laws of the State of North Carolina there would result not only a diminution of revenue from intrastate traffic, but a diminution of revenue from passenger and freight traffic going into and out of and through said State of North Carolina; that interstate rates are made, in many instances, upon the combination of intrastate rates with other rates, and intrastate rates have at all times a most important bearing and influence upon interstate rates.

The affiant further states that the inevitable effect of the diminution of its freight and passenger tariff intrastate will be to diminish its interstate earnings and that to a material and important degree.

The affiant further states that the putting into effect of the rates so ordained by the State of North Carolina—passenger and freight—
will have a large and important influence to the injury of
288½ the capacity of the Southern Railway Company to conduct
its interstate operation and will largely and to an important degree affect its ability to efficiently conduct its interstate business.

The affiant further states that he has been connected with the Southern Railway Company, in charge of its tariff for many years last past and is thoroughly familiar with the conditions of such freight and passenger tariff.

And further the affiant saith not.

J. M. CULP.

Subscribed and sworn to before me this seventh day of May, in the year 1907.

[SEAL.] ALFRED H. OLIVER,
Notary Public.

289 U. S. Circuit Court. Filed Jun- 26, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
vs.
FRANKLIN MCNEILL ET ALS.

The affiant, Richard V. Taylor, states that he is a resident of the city of Mobile, Alabama, and is General Manager of the Mobile & Ohio Railroad Company; that he has been engaged in the railroad business, in various capacities, for about thirty years, during most of all of this time he has been in the Accounting and Operat-

ing Departments of the Mobile & Ohio Railroad Company; that he is familiar with the operation of railroad trains, and with transportation by railroad trains of both passengers and freights; that he is familiar with State and local business and interstate and through business; that there is a close relationship between State and local business, and that there is also a close relationship between interstate and through business; that the expense of transporting State and local business is usually radically different from the expense of transporting the same volume of interstate and through traffic; that the cost of handling State and local freight traffic is, under usual conditions, greatly in excess of the cost of handling through or interstate traffic; that, in his opinion, if a train doing local business and another train doing through business were exactly the same as to volume of traffic handled, under
290 usual conditions the train doing local business would cost considerably more than the train doing through business, for the following reasons:

First, the speed of the through train is usually more than one hundred per cent. greater than the speed of the local train. This, as a rule, results in the crew of the local train being paid the minimum amount for a day's work, instead of for the actual service rendered. For example: most contracts of railroad companies with their trainmen provide for a mileage basis, and also that no trip is to be paid at less than the rate for one hundred miles, and as this one hundred miles, must be run within a certain limit, the local train crew is almost invariably paid for one hundred miles of service, when considerably less than this is actually performed.

Second, a most important difference in the cost between through and local trains is the necessity of the frequent stops of the local as compared with the through train, and the consequent loss of time and inertia, the latter of which must be made up by a considerable increase in the amount of fuel consumed. In the stopping of freight and passenger trains at small stations it has been carefully estimated that the delay and lost inerita is equivalent to the running expense, for freight trains, for four miles, and for passenger trains of two miles. As the mere operating expense of freight and passenger trains is approximately fifty cents per train mile, it can be seen that the expense to the railroad of stopping a freight or passenger train to pick up a small number of passengers or a few hundred pounds of freight to be transported for a short distance is often in excess of the entire revenue received by the railroad company for such transportation.

The necessities for local service also require the construction of side tracks, the cost of which relative to use is very much
291 greater than at terminal points, where through cars in large numbers are switched into train order upon tracks constructed for that purpose. The requirements of local service also are such that local trains must stop for the purpose of switching cars into and out of sidings, as well as re-arranging trains to accommodate such shipments under conditions which make the cost of this service relatively greater than at terminal points where it

is practicable to employ an engine especially constructed for the service.

For these reasons, affiant says that the cost of running local trains as compared with trains doing through business is seventy-five per cent. greater, and that when the usual revenue load of a local freight is taken into consideration that the train expense per ton mile is about 200 per cent. greater for local than through freights.

Affiant says, further, that in his opinion, the operating expenses of a railroad company, including terminal and train expenses, in doing State or local business are, at a minimum, three hundred per cent. greater than the same expense for the same service in doing interstate or through business; and that his opinion is based upon the following state of facts:

The usual conditions affecting interstate as compared with State business are, that the through business is handled in much greater volume and for much longer distances. The expense of handling traffic of railroads is divided into several separate and distinct classes. To determine the cost of each of these classes, as compared with the service rendered, it is necessary to use absolutely separate and distinct units of measure. In handling all freight or passenger traffic between any two terminals the terminal expense and the
.. train expense are absolutely separate and distinct. The unit
292 determining the train expense is the passenger or ton mile.

The only measure which can be applied to the terminal expense, is the actual volume of the traffic, without regard to the distance traveled. For example: A local, passenger taking a train at a local point for a trip of ten miles; when all other things are equal, requires the same cost, as far as the station expense is concerned, as the passenger taking a train to travel a distance of one hundred miles. The usual terminal expense is almost forty per cent. of the total transportation expense, and to carry the illustration a little further on: if it cost a railroad company fifty cents for the terminal expense upon each passenger handled, this cost if applied to a passenger traveling one hundred miles, would show the terminal expense to be at the rate of one-half per cent. per mile, but if applied to a passenger traveling ten miles, it would show the terminal expense to be five cents per mile. The same general rule applies to the movement of freight.

Another factor of great importance, is, that where a station handles a small number of passengers, or a few tons of freight the relative cost per ton or per passenger is almost immeasurably greater than at these terminal points where hundreds of passengers and thousands of tons of freight are handled during the same period.

For all these reasons, and as a result of careful investigation of all the elements of the cost of transportation, both from the standpoint of a railroad accountant and from that of a railroad manager, the affiant has reached the inevitable conclusion that the cost of transporting railroad traffic, both freight and passenger, for short distances is almost immeasurably greater than the relative cost of handling railroad traffic, both freight and passenger, in large vol-

ume for a much greater distance usually traveled by interstate or through freight and passenger traffic. These investigations
293 have conclusively proven that while it is impossible to determine the difference with mathematical precision, the excess of the cost of handling local business is certainly as much as three hundred per cent. greater than the cost of handling through or interstate traffic, with the probability that if there was any known process in accounts by which the matter could be exactly determined that it would show even greater than this. And further the affiant saith not.

RICHARD V. TAYLOR.

Subscribed and sworn to before me by Richard V. Taylor, this 14th day of June, 1907.

[SEAL.] CHARLES E. E. McCARTHY,
Commissioner for the State of North Carolina, in the State of New York.

294 U. S. Circuit Court. Filed Jun. 26, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
vs.
FRANKLIN McNEILL ET ALS.

Personally appeared before me L. Green, who, being duly sworn, deposes and says that he is Freight Traffic Manager, Southern Railway Company, complainant in the above stated case.

Deponent says that a rule requiring the construction of joint freight rates over two or more lines in the State of North Carolina by a combination of the locals of each line minus twenty five per cent., will, in numerous cases, result in total rates for a joint movement as low as, or lower than, the rates for continuous carriages over a single line for corresponding distances, whereas, it, as a rule, costs more to handle business over the lines of two carriers than over the line of one.

Deponent says that merely for the purpose of illustration, he has prepared and attached hereto, marked Exhibit No. One, a statement showing instances where combination of local rates of the Seaboard Air Line and Southern Railway on joint traffic for distances stated therein results in a total joint rate as low as, or lower than, the existing mileage scale of the Southern Railway Company or the Seaboard Air Line, or both for corresponding distance over either
295 or both of said lines singly.

Deponent has also attached, for the same purpose, statement marked exhibit No. Two, giving illustrations of the same character with respect to joint rates of the Atlantic Coast line and Southern Railway in the State of North Carolina.

Deponent says that numerous other instances could be given demonstrating the same fact.

Deponent says that, even as to joint rates between those lines, one of which would be compelled to accept seventy five per cent. of its local rate and the other eighty five per cent. of its local rate, the joint rates thus made are in some cases as low or lower than the continuous mileage rate of one of the carriers for the same distance.

Deponent says that the Raleigh & Southport Railway is not now required to apply a charge of anything less than its full local rates on joint traffic, but that under the recent act of the North Carolina Legislature it would be required to accept fifteen per cent. less than its local rates on joint traffic and the Southern Railway twenty five per cent. less than its local.

Deponent says that the local tariff rate of the Raleigh and Southport Railway for a distance of sixty four miles is, on first class forty three cents; on fifty class and class E, twenty cents; sixty class and class B, seventeen cents and on class A fifteen cents. Said rates are no higher than the combined rate of the Raleigh & Southport Railway for a distance of sixty miles after deducting fifteen per cent., and the rate of the Southern Railway for a distance of four miles after deducting twenty five per cent., and with respect to the fourth class rate for said distance the joint rate so made would be lower than the
296 continuous mileage rate of the Raleigh & Southport Railway for sixty four miles.

Deponent says that this is also true as to fourth class rate for combined distance of forty five miles haul by the Southern Railway and Raleigh & Southport Railway, and that numerous other instances of the same character could be cited.

Deponent says that the existing freight rates of the Southern Railway in North Carolina are reasonably low in consideration of the service rendered, the volume of intra-state traffic and by comparison with rates charged in other Southern states for similar service, said rates have been reduced from time to time by the North Carolina Corporation Commission by actual reductions in the entire scale on some portions of the line, by establishing commodity rates and by changes in the classification, and deponent says that, as a whole, the existing freight tariff of the Southern Railway in North Carolina is lower than it has ever heretofore been.

Deponent says that numerous other rates have been voluntarily reduced by the Southern Railway below the scale fixed by the North Carolina Railroad Commission; said reductions having been made to meet commercial conditions and to enable the people of North Carolina to trade freely with each other with respect to such traffic.

Deponent says that such rates as have thus been reduced for commercial reasons cannot be increased to the legal limits without curtailing the movement of the traffic.

L. GREEN, *Deponent.*

Sworn to and subscribed before me on this the 26th day of June, 1907.

J. H. WEAVER,
Notary Public.

297 EXHIBIT No. 1.

Statement of Rates of Seaboard Air Line and Southern Railway in North Carolina, Illustrating where a Combination of Same Less Twenty-five per Cent. Makes the Joint Rates as Low as or Lower than the Continuous Mileage Rates of Either Line for a Distance Corresponding to the Combined Distance Used.

		Miles.	Per hundred pounds.												Per bbl.
			1	2	3	4	5	6	A	B	C	D	E	H	F
1	S. A. L..	15	17	14	11	9	..	....	..	....	..	....	..	..	....
2	Sou. Ry.	5	9	8	6	5	..	....	..	....	..	....	..	..	....
3	Total.	20	26	22	17	14	..	....	..	....	..	....	..	..	....
4	S. A. L..	20	26	22	17	14	..	....	..	....	..	....	..	..	....
1	S. A. L..	25	22	..	14	12	..	....	..	....	..	6	11	..	....
2	Sou. Ry.	5	9	..	6	5	..	....	..	....	..	3	5	..	....
3	Total.	30	31	..	20	17	..	....	..	....	..	9	16	..	....
4	S. A. L..	30	32	..	20	17	..	....	..	....	..	9	18	..	....
5	Sou. Ry.	30	..	..	20	..	..	....	..	....	..	....	16	..	....
1	S. A. L..	40	27	20	19	17	..	10	8	10	..	7	12	15	....
2	Sou. Ry.	5	9	8	6	5	..	4	4	4	..	3	5	5	....
3	Total.	45	36	28	25	22	..	14	12	14	..	10	17	20	....
4	S. A. L..	45	38	30	26	22	..	14	12	14	..	10	17	22	....
5	Sou. Ry.	45	36	28	..	..	..	....	..	....	..	....	..	20	....
1	S. A. L..	60	31	25	21	18	12	12	9	12	..	8	14	17	....
2	Sou. Ry.	5	9	8	6	5	5	4	4	4	..	3	5	5	....
3	Total.	65	40	33	27	23	17	16	13	16	..	11	19	22	....
4	S. A. L..	65	42	34	29	24	17	17	13	17	..	11	19	23	....
5	Sou. Ry.	65	42	..	28	..	17	....	..	....	..	....	..	..	....
1	S. A. L..	75	34	28	23	18	..	14	..	13	9	9	15	18	18
2	Sou. Ry.	5	9	8	6	5	..	4	..	4	4	3	5	5	7.5
3	Total.	80	43	36	29	23	..	18	..	17	13	12	20	23	25.5
4	S. A. L..	80	45	39	31	25	..	18	..	18	13	12	20	24	26
5	Sou. Ry.	80	44	..	30	..	..	....	..	....	13	....	..	..	26
1	S. A. L..	90	35	31	26	20	14	14	..	14	..	10	16	20	....
2	Sou. Ry.	5	9	8	6	5	5	4	..	4	..	3	5	5	....
3	Total.	95	44	39	32	25	19	18	..	18	..	13	21	25	....
4	S. A. L..	95	48	41	34	26	20	19	..	18	..	13	21	26	....
5	Sou. Ry.	95	48	..	32	..	20	....	..	....	..	....	..	..	....
1	S. A. L..	100	38	32	26	20	15	15	..	14	..	10	17	20	....
2	Sou. Ry.	5	9	8	6	5	5	4	..	4	..	3	5	5	....
3	Total.	105	47	40	32	25	20	19	..	18	..	13	22	25	....
4	S. A. L..	105	50	42	35	27	20	20	..	18.5	..	13.5	22	27	....
5	Sou. Ry.	105	50	40	33	25	20	....	..	....	..	....	..	25	....
1	S. A. L..	125	41	33	27	21	16	15	11	14	12	10	17	20	24
2	Sou. Ry.	5	9	8	6	5	5	4	4	4	4	3	5	5	7.5
3	Total.	130	50	41	33	26	21	19	15	18	14	13	22	25	31.5
4	S. A. L..	130	54	44	36	28	21	20.5	15	18	16	13.5	23	27	32
5	Sou. Ry.	130	54	44	34	26	21	....	15	18	16	13	..	26	32

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	Miles.	1	2	3	4	5	6	A	B	C	D	E	H	F
S. A. L....	150	44	36	28	22	17	16	12	14	13	10.5	18	22	25.5
Sou. Ry...	5	9	8	6	5	5	4	4	4	4	3	5	5	7.5
Total. ...		53	44	34	27	22	20	16	18	17	13.5	23	27	33
S. A. L....	155	50	40	30	30	24	21	16.5	20	17	15	25	29	34
Sou. Ry...	155	50	40	30	29	24	..	16.5	20	17	15	24	29	34
S. A. L....	175	46	38	32	24	21	16	13	16	13.5	12	21	24	27
Sou. Ry...	5	9	8	6	5	5	4	4	4	4	3	5	5	7.5
Total.	180	55	46	38	29	26	20	17	20	17.5	15	26	29	34.5
S. A. L....	180	61	51	42	32	28	21	17	21	18	15.5	28	32	36
Sou. Ry...	180	61	51	42	32	28	21	17	21	18	15.5	28	32	36
S. A. L....	200	47	40	33	26	23	17	13	17	14.5	12	23	26	28.5
Sou. Ry...	5	9	8	6	5	5	4	4	4	4	3	5	5	7.5
Total. ...		56	48	39	31	28	21	17	21	18.5	15	28	31	36
S. A. L....	205	63	53	44	34	30	23	17.5	22	20	17	30	34	40
Sou. Ry...	205	63	53	44	34	30	23	17.5	22	20	16	30	34	40
S. A. L....	5	..	8	7	..	..	..	....	..	....	....	..	..	....
Sou. Ry...	10	..	10	8	..	..	..	....	..	....	....	..	..	....
Total. ...		..	18	15	..	..	..	....	..	....	....	..	..	....
S. A. L....	15	..	18	15	..	..	..	....	..	....	....	..	..	....
Sou. Ry...	...	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	10	..	11	9	..	..	..	....	..	....	....	..	..	....
Sou. Ry...	10	..	10	8	..	..	..	....	..	....	....	..	..	....
Total. ...		..	21	17	..	..	..	....	..	....	....	..	..	....
S. A. L....	20	..	22	17	..	..	..	....	..	....	....	..	..	....
Sou. Ry...	20	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	15	..	14	11	9	..	..	....	..	....	....	..	7	8
Sou. Ry...	10	..	10	8	7	..	..	....	..	....	....	..	6	7
Total. ...		..	24	19	16	..	..	....	..	....	....	..	13	15
S. A. L....	25	..	24	19	46	..	..	....	..	....	....	..	13	15
Sou. Ry...	25	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	25	..	..	14	12	..	8	....	..	....	....	..	..	11
Sou. Ry...	10	..	..	8	7	..	5	....	..	....	....	..	..	7
Total. ...		..	..	22	19	..	13	....	..	....	....	..	..	18
S. A. L....	35	..	..	21	20	..	13	....	..	....	....	..	..	18
Sou. Ry...	35	..	..	22	..	..	..	....	..	....	....	..	..	18
S. A. L....	40	..	20	19	..	..	10	....	..	10	....	12	15	....
Sou. Ry...	10	..	10	8	..	..	5	....	..	5	....	6	7	....
Total. ...		..	30	27	..	..	15	....	..	15	....	18	22	....
S. A. L....	50	..	32	27	..	..	15	....	..	15	....	18	22	....
Sou. Ry...	50	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	60	..	25	21	..	..	12	....	..	12	....	14	..	....
Sou. Ry...	10	..	10	8	..	..	5	....	..	5	....	6	..	....
Total. ...		..	35	29	..	..	17	....	..	17	....	20	..	....
S. A. L....	70	..	35	29	..	..	17	....	..	17	....	20	..	....
Sou. Ry...	70	..	..	..	..	..	..	....	..	....	....	..	..	....

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	Miles.	1	2	3	4	5	6	A	B	C	D	E	H	F
S. A. L....	75	..	28	23	18	..	..	....	13	....	....	15	..	....
Sou. Ry...	10	..	10	8	7	..	..	....	5	....	....	6	..	....
Total. ...		38	31	25	..	..	..	....	18	....	....	21	..	....
S. A. L....	85	..	40	33	25	..	..	....	18	....	....	21	..	....
Sou. Ry...	85	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	90	..	31	26	..	14	14	....	..	....	....	..	..	....
Sou. Ry...	10	..	10	8	..	6	5	....	..	....	....	..	..	....
Total. ...		..	41	34	..	20	19	....	..	....	....	..	..	....
S. A. L....	100	..	42	35	..	20	19	....	..	....	....	..	..	....
Sou. Ry...	100	..	..	..	..	20	..	....	..	....	....	..	..	....
S. A. L....	100	..	32	26	20	..	15	....	..	....	....	..	20	....
Sou. Ry...	10	..	10	8	7	..	5	....	..	....	....	..	7	....
Total. ...		..	42	34	27	..	20	....	..	....	....	..	27	....
S. A. L....	110	..	42	35	27	..	20	....	..	....	....	..	27	....
Sou. Ry...	110	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	125	41	35	27	21	16	15	11	14	....	10	17	20	....
Sou. Ry...	10	14	10	8	7	6	5	5	5	....	4	6	7	....
Total. ...		55	43	35	28	22	20	16	19	....	14	23	27	....
S. A. L....	135	56	46	36	28	22	21	16	19	....	14	24	28	....
Sou. Ry...	135	56	46	36	..	22	..	....	19	....	14	..	..	....
S. A. L....	150	44	36	28	22	17	16	....	14	....	10.5	18	22	....
Sou. Ry...	10	14	10	8	7	6	5	....	5	....	4	6	7	....
Total. ...		58	46	36	29	23	21	....	19	....	14.5	24	29	....
S. A. L....	160	59	49	39	30	24	21	....	20	....	15	25	29	....
Sou. Ry...	160	59	49	39	29	24	..	....	20	....	15	24	29	....
S. A. L....	175	46	38	32	24	21	16	....	16	13.5	....	21	24	27
Sou. Ry...	10	14	10	8	7	6	5	....	5	4.5	....	6	7	9
Total. ...		60	48	40	31	27	21	....	21	18	....	27	31	36
S. A. L....	185	62	52	43	33	29	22	....	21	19	....	29	33	38
Sou. Ry...	185	62	52	43	33	29	22	....	21	19	....	29	33	38
S. A. L....	200	47	40	33	26	23	17	....	17	14.5	12	23	26	28.5
Sou. Ry...	10	14	10	8	7	6	5	....	5	4.5	4	6	7	9
Total. ...		61	51	41	33	29	22	....	22	19	16	29	33	37.5
S. A. L....	210	63	53	44	34	30	23	....	22	20	17	30	34	40
Sou. Ry...	210	63	53	44	34	30	23	....	22	20	16	30	34	40
S. A. L....	5	9	8	..	6	..	..	....	..	....	....	..	..	....
Sou. Ry...	15	16	12	..	8	..	..	....	..	....	....	..	..	....
Total. ...		25	20	..	14	..	..	....	..	....	....	..	..	....
S. A. L....	20	26	22	..	14	..	..	....	..	....	....	..	..	....
Sou. Ry...	20	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	10	..	11	..	8	..	..	....	5	....	....	..	7	....
Sou. Ry...	15	..	12	..	8	..	..	....	5	....	....	..	8	....
Total. ...		..	23	..	16	..	..	....	10	....	....	..	15	....
S. A. L....	25	..	24	..	16	..	..	....	10	....	....	..	15	....
Sou. Ry...	25	..	..	..	..	..	..	....	..	....	....	..	..	....

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	Miles.	1	2	3	4	5	6	A	B	C	D	E	H	F
S. A. L....	15	..	..	..	9	..	..	....	6	....	....	7	8	....
Sou. Ry...	15	..	..	..	8	..	..	....	5	....	....	7	8	....
Total. ...		..	..	..	17	..	..	....	11	....	....	14	16	....
S. A. L....	30	..	..	..	18	..	..	....	11	....	....	14	18	....
Sou. Ry....	30	..	..	..	..	..	..	....	..	....	....	..	16	....
S. A. L....	25	..	..	14	12	..	..	....	8	....	....	..	11	....
Sou. Ry...	15	..	..	11	8	..	..	....	5	....	....	..	8	....
Total. ...		..	..	25	20	..	..	....	13	....	....	..	19	....
S. A. L....	40	..	..	25	22	..	..	....	13	....	....	..	20	....
Sou. Ry...	40	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	40	..	20	..	..	..	10	....	10	....	....	..	15	....
Sou. Ry...	15	..	12	..	..	..	6	....	5	....	....	..	8	....
Total. ...		..	32	..	..	..	16	....	15	....	....	..	23	....
S. A. L....	55	..	32	..	..	..	16	....	16	....	....	..	23	....
Sou. Ry...	55	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	60	..	25	..	..	..	12	....	12	....	....	..	..	....
Sou. Ry...	15	..	12	..	..	..	6	....	5	....	....	..	..	....
Total. ...		..	37	..	..	..	18	....	17	....	....	..	..	....
S. A. L....	75	..	37	..	..	..	18	....	17	....	....	..	..	....
Sou. Ry...	75	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	75	..	28	23	18	..	..	....	13	....	....	..	18	....
Sou. Ry...	15	..	12	11	8	..	..	....	5	....	....	..	8	....
Total. ...		..	40	34	26	..	..	....	18	....	....	..	26	....
S. A. L....	90	..	41	34	26	..	..	....	18	....	....	..	26	....
Sou. Ry...	...	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	125	..	33	..	..	..	15	11	14	....	....	17	20	....
Sou. Ry...	15	..	12	..	..	..	6	5	5	....	....	7	8	....
Total. ...		..	45	..	..	..	21	16	19	....	....	24	28	....
S. A. L....	140	..	46	..	..	..	21	16	19	....	....	24	28	....
Sou. Ry...	140	..	46	..	..	..	..	16	19	....	....	..	..	....
S. A. L....	150	44	36	28	22	17	..	12	14	....	10.5	18	22	25.5
Sou. Ry...	15	16	12	11	8	7	..	5	5	....	4.5	7	8	10.5
Total. ...		60	48	39	30	24	..	17	19	....	15	25	30	36
S. A. L....	165	60	50	41	31	23	..	17	20	....	15	26	31	36
Sou. Ry...	165	..	49	39	..	24	..	....	20	....	15	..	..	....
S. A. L....	175	46	38	32	24	21	16	....	16	13.5	....	21	24	27
Southern..	15	16	12	11	8	7	6	....	5	5.5	....	7	8	10.5
Total. ...		62	50	43	32	28	22	....	21	19	....	28	32	37.5
S. A. L....	190	62	52	43	33	29	22	....	21	19	....	29	33	38
Sou. Ry...	190	62	52	43	33	29	22	....	21	19	....	29	33	38
S. A. L....	200	47	40	33	26	23	17	13	17	14.5	12	23	26	28.5
Sou. Ry...	15	16	12	11	8	7	6	5	5	5.5	4.5	7	8	10.5
Total. ...		63	52	44	34	30	23	18	22	20	16.5	30	34	39
S. A. L....	215	64	54	45	35	31	24	18	23	20	17	31	35	40
Sou. Ry...	215	64	54	45	35	31	24	18	23	20	17	31	35	40

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	Miles.	1	2	3	4	5	6	A	B	C	D	E	H	F
S. A. L....	5	9	8	7	6	..	5	....	..	....	....	5	5	....
Sou. Ry...	20	18	14	12	10	..	6	....	..	....	....	8	9	....
Total. ...		27	22	19	16	..	11	....	..	....	....	13	14	....
S. A. L....	25	29	24	19	16	..	11	....	..	....	....	13	15	....
Sou. Ry...	25	27	..	..	..	..	..	....	..	....	....	..	**14**	....
S. A. L....	10	14	11	..	8	..	..	5	5	....	....	..	7	....
Sou. Ry...	20	18	14	..	10	..	..	5	6	....	....	..	**9**	....
Total. ...		32	25	..	18	..	..	10	11	....	....	..	16	....
S. A. L....	30	32	25	..	18	..	..	10	11	....	....	..	18	....
Sou. Ry...	30	..	..	..	..	..	..	....	..	....	....	..	16	....
S. A. L....	15	..	..	..	9	..	7	6	6	....	....	7	8	....
Sou. Ry...	20	..	..	..	10	..	6	5	6	....	....	**8**	**9**	....
Total. ...		..	..	..	19	..	13	11	12	....	....	15	17	....
S. A. L....	35	..	..	..	20	..	13	11	12	....	....	15	18	....
Sou. Ry...	35	..	..	..	..	..	..	....	..	....	....	..	**18**	....
S. A. L....	25	..	..	14	12	..	8	7	8	....	....	..	11	....
Sou. Ry...	20	..	..	12	10	..	6	5	6	....	....	..	9	....
Total.		..	..	26	22	..	14	12	14	....	....	..	20	....
S. A. L....	45	..	..	26	22	..	14	12	14	....	....	..	22	....
Sou. Ry...	45	..	..	..	..	..	..	....	..	....	....	..	20	....
S. A. L....	50	..	25	..	..	..	12	....	12	....	....	..	..	....
Sou. Ry...	20	..	14	..	..	..	6	....	6	....	....	..	..	....
Total. ...		..	39	..	..	..	18	....	18	....	....	..	..	....
S. A. L....	80	..	39	..	..	..	18	....	18	....	....	..	..	....
Sou. Ry...	80	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	125	..	33	..	..	..	15	11	..	....	....	..	20	....
Sou. Ry...	20	..	14	..	..	..	6	5	..	....	....	..	9	....
Total. ...		..	47	..	..	..	21	16	..	....	....	..	29	....
S. A. L....	145	..	48	..	..	..	21	16.5	..	....	....	..	29	....
Sou. Ry...	145	..	48	..	..	..	..	16.5	..	....	....	..	..	....
S. A. L....	150	..	36	28	..	17	..	12	14	....	....	18	22	....
Sou. Ry...	20	..	14	12	..	8	..	5	6	....	....	8	9	....
Total. ...		..	50	40	..	25	..	17	20	....	....	26	31	....
S. A. L....	170	..	50	41	..	26	..	17	20	....	....	26	31	....
Sou. Ry...	170	..	50	41	..	26	..	17	20	....	....	26	31	....
S. A. L....	175	..	38	32	24	21	16	....	16	....	....	21	24	....
Sou. Ry...	20	..	14	12	10	8	6	....	6	....	....	8	9	....
Total. ...		..	52	44	34	29	22	....	22	....	....	29	33	....
S. A. L....	195	..	53	44	34	30	23	....	22	....	....	30	34	....
Sou. Ry...	195	..	53	44	34	30	23	....	22	....	....	30	34	....
S. A. L....	200	..	40	33	..	23	17	13	17	....	....	23	26	....
Sou. Ry...	20	..	14	12	..	8	6	5	6	....	....	8	9	....
Total. ...		..	54	45	..	31	23	18	23	....	....	31	35	....
S. A. L....	220	..	54	45	..	31	24	18	23	....	....	31	35	....
Sou. Ry...	220	..	54	45	..	31	24	18	23	....	....	31	35	....

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	Miles.	1	2	3	4	5	6	A	B	C	D	E	H	F
S. A. L....	5	9	8	..	6	..	..	....	..	....	....	5	5	....
Sou. Ry...	25	20	15	..	11	..	..	....	..	....	....	9	11	....
Total. ...		29	23	..	17	..	..	....	..	....	....	14	16	....
S. A. L....	30	32	25	..	18	..	..	....	..	....	....	14	18	....
Sou. Ry...	30	30	24	..	..	..	..	....	..	....	....	..	16	....
S. A. L....	10	14	11	..	8	..	6	5	5	....	....	..	7	....
Sou. Ry...	25	20	15	..	11	..	7	6	7	....	....	..	11	....
Total. ...		34	26	..	19	..	13	11	12	....	....	..	18	....
S. A. L....	35	34	26	..	20	..	13	11	12	....	....	..	18	....
Sou. Ry...	35	..	..	..	..	..	....	..	....	....	..	..	18	....
S. A. L....	15	..	..	11	9	..	..	....	6	....	....	7	8	....
Sou. Ry...	25	..	..	14	11	..	..	....	7	....	....	9	11	....
Total. ...		..	..	25	20	..	..	....	13	....	....	16	19	....
S. A. L....	40	..	..	25	22	..	..	....	13	....	....	16	20	....
Sou. Ry...	40	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	25	..	..	..	12	..	8	....	8	....	....	..	11	....
Sou. Ry...	25	..	..	..	11	..	7	....	7	....	....	..	11	....
Total. ...		..	..	..	23	..	15	....	15	....	....	..	22	....
S. A. L....	50	..	..	..	23	..	15	....	15	....	....	..	22	....
Sou. Ry...	50	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	125	..	33	..	..	..	..	11	..	....	....	..	..	....
Sou. Ry...	25	..	15	..	..	..	..	6	..	....	....	..	..	....
Total. ...		..	48	..	..	..	..	17	..	....	....	..	..	....
S. A. L....	150	..	48	..	..	..	..	16.5	..	....	....	..	..	....
Sou. Ry...	150	..	48	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	150	..	36	28	..	17	..	....	14	....	....	18	..	....
Sou. Ry...	25	..	15	14	..	9	..	....	7	....	....	9	..	....
Total. ...		..	51	42	..	26	..	....	21	....	....	27	..	....
S. A. L....	175	..	51	42	..	28	..	....	21	....	....	28	..	....
Sou. Ry...	175	..	51	42	..	28	..	....	21	....	....	28	..	....
S. A. L....	175	..	38	..	..	21	16	....	..	....	....	21	..	....
Sou. Ry...	25	..	15	..	..	9	7	....	..	....	....	9	..	....
Total. ...		..	53	..	..	30	23	....	..	....	....	30	..	....
S. A. L....	200	..	53	..	..	30	23	....	..	....	....	30	..	....
Sou. Ry...	200	..	53	..	..	30	23	....	..	....	....	30	..	....
S. A. L....	200	..	..	..	..	..	17	....	..	....	12	..	..	28.5
Sou. Ry...	25	..	..	..	..	..	7	....	..	....	6	..	..	13.5
Total. ...		..	..	..	..	..	24	....	..	....	18	..	..	42
S. A. L....	225	..	..	..	..	..	24	....	..	....	18	..	..	42
Sou. Ry...	225	..	..	..	..	..	24	....	..	....	....	..	..	42
S. A. L....	5	9	8	7	6	..	5	5	..	....	....	5	5	....
Sou. Ry...	30	23	18	15	12	..	8	6	..	....	....	10	12	....
Total. ...		32	26	22	18	..	13	11	..	....	....	15	17	....
S. A. L....	35	34	26	21	20	..	13	11	..	....	....	15	18	....
Sou. Ry...	35	33	26	22	18	..	..	....	..	....	....	..	18	....

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	Miles.	1	2	3	4	5	6	A	B	C	D	E	H	F
S. A. L....	10	..	..	9	8	..	..	5	5	....	....	..	..	7
Sou. Ry...	30	..	..	15	12	..	..	6	8	....	....	..	..	12
Total. ...		..	..	24	20	..	..	11	13	....	....	..	..	19
S. A. L....	40	..	..	25	22	..	..	11	13	....	....	..	..	20
Sou. Ry...	40	..	..	22	..	..	..	....	..	....	....	..	..	....
S. A. L....	15	..	..	11	9	..	..	6	6	....	....	..	7	8
Sou. Ry...	30	..	..	15	12	..	..	6	8	....	....	..	10	12
Total. ...		..	..	26	21	..	..	12	14	....	....	..	17	20
S. A. L....	45	..	..	26	22	..	..	12	14	....	....	..	17	22
Sou. Ry...	45	..	..	..	..	..	..	....	..	....	....	..	..	20
S. A. L....	25	..	..	..	..	..	8	....	8	....	....	..	..	11
Sou. Ry...	30	..	..	..	..	..	8	....	8	....	....	..	..	12
Total. ...		..	..	..	..	..	16	....	16	....	....	..	..	23
S. A. L....	55	..	..	..	..	..	16	....	16	....	....	..	..	23
Sou. Ry...	55	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	5	9	..	7	6	..	5	....	5	....	....	..	5	5
Sou. Ry...	35	25	..	17	14	..	8	....	8	....	....	..	11	14
Total. ...		34	..	24	20	..	13	....	13	....	....	..	16	19
S. A. L....	40	36	..	25	22	..	13	....	13	....	....	..	16	20
Sou. Ry...	40	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	10	..	..	9	8	..	6	5	5	....	....	..	..	7
Sou. Ry...	35	..	..	17	14	..	8	7	8	....	....	..	..	14
Total. ...		..	..	26	22	..	14	12	13	....	....	..	..	21
S. A. L....	45	..	..	26	22	..	14	12	14	....	....	..	..	22
Sou. Ry...	45	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	15	..	..	..	9	..	7	....	6	....	....	..	7	8
Sou. Ry...	35	..	..	..	14	..	8	....	8	....	....	..	11	14
Total. ...		..	..	..	23	..	15	....	14	....	....	..	18	22
S. A. L....	50	..	..	..	23	..	15	....	15	....	....	..	18	22
Sou. Ry...	50	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	25	..	..	..	..	..	8	....	8	....	....	..	..	....
Sou. Ry...	35	..	..	..	..	..	8	....	8	....	....	..	..	....
Total. ...		..	..	..	..	..	16	....	16	....	....	..	..	....
S. A. L....	60	..	..	..	..	..	16	....	16	....	....	..	..	....
Sou. Ry...	60	..	..	..	..	..	..	....	..	....	....	..	..	....
S. A. L....	150	..	..	..	..	17	..	....	..	....	....	..	18	....
Sou. Ry...	35	..	..	..	..	11	..	....	..	....	....	..	11	....
Total. ...		..	..	..	..	28	..	....	..	....	....	..	29	....
S. A. L....	185	..	..	..	..	29	..	....	..	....	....	..	29	....
Sou. Ry...	185	..	..	..	..	29	..	....	..	....	....	..	29	....

Key.

First line of figures, S. A. L. locals less 25%.
Second line of figures, Southern Ry. locals less 25%.
Third line of figures, a combination of first and second lines.
Fourth line of figures, S. A. L. local for continuous distance.
Fifth line of figures, Southern Ry. local for continuous distance.

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EXHIBIT No. 2.

Statement of Rates of Atlantic Coast Line and Southern Railway in North Carolina, Illustrating where a Combination of Same Less Twenty-five per Cent. Makes the Joint Rates as Low as or Lower than the Continuous Mileage Rates of Either Line for a Distance Corresponding to the Combined Distance Used.

	Miles.	1	2	3	4	5	6	A	B	C	D	E	H	F
1 A. C. L.	5	9	..	..	..	..	..	....	..	....	....	..	..	....
2 So. Ry..	5	9	..	..	..	..	..	....	..	....	....	..	..	....
3 Total.	10	18	..	..	..	..	..	....	..	....	....	..	..	....
4 A. C. L.	10	18	..	..	..	..	..	....	..	....	....	..	..	....
5 So. Ry..	10	18	..	..	..	..	..	....	..	....	....	..	..	....
1 A. C. L.	10	..	..	8	..	..	5	....	..	....	....	..	..	....
2 So. Ry..	5	..	..	6	..	..	4	....	..	....	....	..	..	....
3 Total.	15	..	..	14	..	..	9	....	..	....	....	..	..	....
4 A. C. L.	15	..	..	14	..	..	9	....	..	....	....	..	..	....
5 So. Ry..	15	..	..	14	..	..	..	....	..	....	....	..	..	....
1 A. C. L.	15	..	..	..	8	..	..	....	..	....	....	..	8	....
2 So. Ry..	5	..	..	..	5	..	..	....	..	....	....	..	5	....
3 Total.	20	..	..	..	13	..	..	....	..	....	....	..	13	....
4 A. C. L.	20	..	..	..	13	..	..	....	..	....	....	..	13	....
5 So. Ry..	20	..	..	..	13	..	..	....	..	....	....	..	..	....
1 A. C. L.	20	18	..	12	10	8	..	....	..	....	....	8	10	....
2 So. Ry..	5	9	..	6	5	5	..	....	..	....	....	5	5	....
3 Total.	25	27	..	18	15	13	..	....	..	....	....	13	15	....
4 A. C. L.	25	27	..	18	15	13	..	....	..	....	....	13	15	....
5 So. Ry..	25	27	..	18	00	00	..	....	..	....	....	..	..	....
1 A. C. L.	25	20	15	14	11	..	..	....	..	....	....	..	11	....
2 So. Ry..	5	9	8	6	5	..	..	....	..	....	....	..	5	....
3 Total.	30	29	23	20	16	..	..	....	..	....	....	..	16	....
4 A. C. L.	30	30	24	20	18	..	..	....	..	....	....	..	18	....
5 So. Ry..	30	30	24	20	16	..	..	....	..	....	....	..	16	....
1 A. C. L.	30	23	18	15	14	..	8	....	8	....	6	..	14	....
2 So. Ry..	5	9	8	6	5	..	4	....	4	....	3	..	5	....
3 Total.	35	32	26	21	19	..	12	....	12	....	9	..	19	....
4 A. C. L.	35	33	26	22	20	..	12	....	12	....	9	..	19	....
5 So. Ry..	35	33	26	22	..	..	..	....	..	....	9	..	..	....
1 A. C. L.	40	25	20	17	15	11	9	....	9	....	....	11	15	....
2 So. Ry..	5	9	8	6	5	5	4	....	4	....	....	5	5	....
3 Total.	45	34	28	23	20	16	13	....	13	....	....	16	20	....
4 A. C. L.	45	36	28	24	22	17	13	....	13	....	....	17	22	....
5 So. Ry..	45	36	28	24	20	..	..	....	..	....	....	..	20	....
1 A. C. L.	45	27	..	18	17	..	..	....	..	....	....	..	17	....
2 So. Ry..	5	9	..	6	5	..	..	....	..	....	....	..	5	....
3 Total.	50	36	..	24	22	..	..	....	..	....	....	..	22	....
4 A. C. L.	50	36	..	24	22	..	..	....	..	....	....	..	22	....
5 So. Ry..	50	36	..	24	..	..	..	....	..	....	....	..	..	....

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	Miles.	1	2	3	4	5	6	A	B	C	D	E	H	F
A. C. L..	50	27	21	18	17	13	10	8	10	....	7	13	17	....
Sou. Ry.	5	9	8	6	5	5	4	4	4	....	3	5	5	....
Total. ...		36	29	24	22	18	14	12	14	....	10	18	22	....
A. C. L..	55	39	30	26	23	18	14	12	14	....	10	18	23	....
Sou. Ry.	55	39	30	26	..	..	..	....	....	....	10	..	..	....
A. C. L..	55	29	..	20	17	..	..	....	....	....	....	..	17	....
Sou. Ry.	5	9	..	6	5	..	..	....	....	....	....	..	5	....
Total. ...		38	..	26	22	..	..	....	....	....	....	..	22	....
A. C. L..	60	39	..	26	23	..	..	....	....	....	....	..	23	....
Sou. Ry.	60	39	..	26	..	..	..	....	....	....	....	..	21	....
A. C. L..	60	29	23	20	17	14	11	9	11	....	....	14	17	....
Sou. Ry.	5	9	8	6	5	5	4	4	4	....	....	5	5	....
Total. ...		38	31	26	22	19	15	13	15	....	....	19	22	....
A. C. L..	65	42	32	28	23	19	15	13	15	....	....	19	23	....
Sou. Ry.	65	42	32	28	..	..	..	....	....	....	....	..	..	....
A. C. L..	65	32	24	21	17	14	11	....	11	....	....	14	17	....
Sou. Ry.	5	9	8	6	5	5	4	....	4	....	....	5	5	....
Total. ...		41	32	27	22	19	15	....	15	....	....	19	22	....
A. C. L..	70	42	32	28	23	19	15	....	15	....	....	19	23	....
Sou. Ry.	70	42	32	28	..	..	..	....	....	....	....	..	..	....
A. C. L..	70	32	24	21	17	14	11	....	11	....	....	14	17	....
Sou. Ry.	5	9	8	6	5	5	4	....	4	....	....	5	5	....
Total. ...		41	32	27	22	19	15	....	15	....	....	19	22	....
A. C. L..	75	44	34	30	24	20	17	....	15	....	....	20	24	....
Sou. Ry.	75	44	34	30	22	..	15	....	15	....	....	..	22	....
A. C. L..	75	33	26	23	18	15	13	....	11	9	7.5	15	18	18
Sou. Ry.	5	9	8	6	5	5	4	....	4	4	3	5	5	7.5
Total. ...		42	34	29	23	20	17	....	15	13	10.5	20	23	25.5
A. C. L..	80	44	34	30	24	20	17	....	15	13	11	20	24	26
Sou. Ry.	80	44	34	30	..	..	..	....	15	13	11	..	..	26
A. C. L..	80	33	26	23	18	15	13	....	11	....	8	15	18	....
Sou. Ry.	5	9	8	6	5	5	4	....	4	....	3	5	5	....
Total. ...		42	34	29	23	20	17	....	15	....	11	20	23	....
A. C. L..	85	45	36	31	24	21	17	....	15.5	....	11	21	24	....
Sou. Ry.	85	46	36	31	..	..	..	....	16	....	11	..	..	....
A. C. L..	85	34	27	23	18	16	13	....	12	....	....	16	18	19.5
Sou. Ry.	5	9	8	6	5	5	4	....	4	....	....	5	5	7.5
Total. ...		43	35	29	23	21	17	....	16	....	....	21	23	27
A. C. L..	90	46	36	31	24	21	17	....	15.5	....	....	21	24	27
Sou. Ry.	90	46	36	31	..	..	..	....	16	....	....	..	..	27
A. C. L..	90	35	27	23	18	16	13	10	12	10	8.5	16	18	20.5
Sou. Ry.	5	9	8	6	5	5	4	4	4	4	3	5	5	7.5
Total. ...		44	35	29	23	21	17	14	16	14	11.5	21	23	27.5
A. C. L..	95	47	38	32	26	22	18	13.5	15.5	14	11.5	22	26	28
Sou. Ry.	95	48	38	32	24	..	..	14	16	....	....	..	24	....

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	Miles.	1	2	3	4	5	6	A	B	C	D	E	H	F
A. C. L..	95	35	29	24	20	17	14	10	12	....	8.5	17	20	....
So. Ry..	5	9	8	6	5	5	4	4	4	....	3	5	5	....
Total. ...		44	37	30	25	22	18	14	16	....	11.5	22	25	....
A. C. L..	100	47	38	32	26	22	18	13.5	16.5	11.5	....	22	26	....
Sou. Ry.	100	48	38	32	..	..	..	14	17	....	12	..	..	....
A. C. L..	100	35	29	24	20	17	14	10	12	....	8.5	17	20	....
Sou. Ry.	5	9	8	6	5	5	4	4	4	....	3	5	5	....
Total. ...		44	37	30	25	22	18	14	16	....	11.5	22	25	....
A. C. L..	105	50	40	33	27	22	18	14	16	....	12	22	27	....
Sou. Ry.	105	50	40	33	25	..	..	14	17	....	12	..	25	....
A. C. L..	110	38	30	25	20	17	14	11	12	10.5	9	17	20	21
Sou. Ry.	5	9	8	6	5	5	4	4	4	4	3	5	5	7.5
Total. ...		47	38	[31	25	22	18]*	15	16	14.5	12	22	25	28.5
A. C. L..	115	50	42	34	27	23	19	14	16	15	12	23	27	30
Sou. Ry.	115	52	42	34	25	..	..	15	18	15	13	..	25	30
A. C. L..	125	39	33	26	21	17	14	11	13	12	10	17	21	24
Sou. Ry.	5	9	8	6	5	5	4	4	4	4	3	5	5	7.5
Total. ..		48	41	32	26	22	18	15	17	16	13	22	26	31.5
A. C. L..	130	52	44	35	28	23	19	15	17	16	13	23	28	32
Sou. Ry.	130	54	44	34	26	..	..	15	18	16	13	..	26	32
A. C. L..	150	41	35	28	22	18	15	12	14	13	10.5	18	22	25.5
Sou. Ry.	5	9	8	6	5	5	4	4	4	4	3	5	5	7.5
Total. ...		50	43	34	27	23	19	16	18	17	13.5	13	27	33
A. C. L..	155	54	47	39	29	25	20	15.5	18	17	14	25	29	34
Sou. Ry.	155	59	49	39	29	29	19	16.5	20	17	15	26	29	34
A. C. L..	15	..	..	..	8	7	..	....	....	....	....	7	8	....
Sou. Ry.	10	..	..	..	7	6	..	....	....	....	....	6	7	....
Total. ...		..	..	..	15	13	..	....	....	....	....	13	15	....
A. C. L..	25	..	..	..	15	13	..	....	....	....	....	13	15	....
Sou. Ry.	25	..	..	..	..	..	..	....	....	....	....	..	..	....
A. C. L..	20	..	14	12	10	8	..	....	....	....	....	8	10	....
Sou. Ry.	10	..	10	8	7	6	..	....	....	....	....	6	7	....
Total. ...		..	24	20	17	14	..	....	....	....	....	14	17	....
A. C. L..	30	..	24	20	18	14	..	....	....	....	....	14	18	....
Sou. Ry.	30	..	24	28	..	..	..	....	....	....	....	..	..	....
A. C. L..	25	..	15	14	11	..	..	....	....	....	....	..	11	....
Sou. Ry.	10	..	10	8	7	..	..	....	....	....	....	..	7	....
Total. ...		..	25	22	18	..	..	....	....	....	....	..	18	....
A. C. L..	35	..	26	22	20	..	..	....	....	....	....	..	20	....
Sou. Ry.	35	..	26	22	18	..	..	....	....	....	....	..	18	....
A. C. L..	35	..	..	..	15	11	..	....	....	....	....	11	..	....
Sou. Ry.	10	..	..	..	7	6	..	....	....	....	....	6	..	....
Total. ...		..	..	..	22	17	..	....	....	....	....	17	..	....
A. C. L..	45	..	..	..	22	17	..	....	....	....	....	17	..	....
Sou. Ry.	45	..	..	..	..	..	..	....	....	....	....	..	..	....

[* Figures enclosed in brackets erased in copy.]

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	Miles.	1	2	3	4	5	6	A	B	C	D	E	H	F	
A. C. L....	40	..	..	..	15	11	..	....	..	....	....		11	15	....
Sou. Ry...	10	..	..	..	7	6	..	....	..	....	....		6	7	....
Total. ...		..	..	..	22	17	..	....	..	....	....		17	22	....
A. C. L....	50	..	..	..	22	17	..	....	..	....	....		17	22	....
Sou. Ry...	50	..	..	..	..	..	..	....	..	....	....		..	..	....
A. C. L....	65	..	24	21	17	14	11	....	..	....	....		14	17	....
Sou. Ry...	10	..	10	8	7	6	5	....	..	....	....		6	7	....
Total. ...		..	34	29	24	20	16	....	..	....	....		20	24	....
A. C. L....	75	..	34	30	24	20	17	....	..	....	....		20	24	....
Sou. Ry...	75	..	34	30	..	..	..	....	..	....	....		..	..	....
A. C. L....	70	..	24	21	17	14	11	....	..	....	....		14	17	....
Sou. Ry...	10	..	10	8	7	6	5	....	..	....	....		6	7	....
Total. ...		..	34	29	24	20	16	....	..	....	....		20	24	....
A. C. L....	80	..	34	30	24	20	17	....	..	....	....		20	24	....
Sou. Ry...	80	..	34	30	..	..	..	....	..	....	....		..	..	....
A. C. L....	5	..	..	..	5	..	..	....	4	....	....		..	5	....
Sou. Ry...	15	..	..	..	8	..	..	....	5	....	....		..	8	....
Total. ...		..	..	..	13	..	..	....	9	....	....		..	13	....
A. C. L....	20	..	..	..	13	..	..	....	9	....	....		..	13	....
Sou. Ry...	20	..	..	..	13	..	..	....	..	....	....		..	..	....
A. C. L....	10	..	..	..	7	6	..	....	5	....	....		6	7	....
Sou. Ry...	15	..	..	..	8	7	..	....	5	....	....		7	8	....
Total. ...		..	..	..	15	13	..	....	10	....	....		13	15	....
A. C. L....	25	..	..	..	15	13	..	....	10	....	....		13	15	....
Sou. Ry...	25	..	..	..	..	..	..	....	..	....	....		..	..	....
A. C. L....	15	..	12	..	8	7	..	....	6	....	....		7	8	....
Sou. Ry...	15	..	12	..	8	7	..	....	5	....	....		7	8	....
Total. ...		..	24	..	16	14	..	....	11	....	....		14	16	....
A. C. L....	30	..	24	..	18	14	..	....	11	....	....		14	18	....
Sou. Ry...	30	..	24	..	16	13	..	....	..	....	....		..	16	....
A. C. L....	20	..	14	..	10	..	..	....	7	....	....		8	10	....
Sou. Ry...	15	..	12	..	8	..	..	....	5	....	....		7	8	....
Total. ...		..	26	..	18	..	..	....	12	....	....		15	18	....
A. C. L....	35	..	26	..	20	..	..	....	12	....	....		15	20	....
Sou. Ry...	35	..	26	..	18	..	..	....	..	....	....		..	18	....
A. C. L....	25	..	..	..	11		..	....	..	....	....		..	11	....
Sou. Ry...	15	..	..	..	8	..	..	....	..	....	....		..	8	....
Total. ...		..	..	..	19	..	..	....	..	....	....		..	19	....
A. C. L....	40	..	..	..	20	..	..	....	..	....	....		..	20	....
Sou. Ry...	40	..	..	..	..	..	..	....	..	....	....		..	..	....
A. C. L....	30	..	..	..	14	..	..	....	8	....	....		..	..	....
Sou. Ry...	15	..	..	..	8	..	..	....	5	....	....		..	..	....
Total. ...		..	..	..	22	..	..	....	13	....	....		..	..	....
A. C. L....	45	..	..	..	22	..	..	....	13	....	....		..	..	....
Sou. Ry...	45	..	..	..	..	..	..	....	..	....	....		..	..	....

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	Miles.	1	2	3	4	5	6	A	B	C	D	E	H	F
A. C. L...	40	..	..	..	15	11	..	..	9	..	....	11	15	..	
Sou. Ry...	15	..	..	..	8	7	..	..	5	..	....	7	8	..	
Total.	...	..	..	..	23	18	..	..	14	..	....	18	23	..	
A. C. L...	55	..	..	..	23	18	..	..	14	..	....	18	23	..	
Sou. Ry...	55	..	..	..	..	..	..	..	..	..	....	..	..	..	
A. C. L...	90	..	27	18	..	..	..	..	12	..	....	..	18	..	
Sou. Ry...	15	..	12	8	..	..	..	..	5	..	....	..	8	..	
Total.	...	..	39	26	..	..	..	..	17	..	....	..	26	..	
A. C. L...	105	..	40	27	..	..	..	..	16	..	....	..	27	..	
Sou. Ry...	105	..	40	..	..	..	..	..	17	..	....	..	..	..	
A. C. L...	100	35	29	..	..	..	..	10	12	..	8.5	..	..	..	
Sou. Ry...	15	16	12	..	..	..	..	5	5	..	4.5	..	..	..	
Total.	...	51	41	..	..	..	..	15	17	..	13	..	..	..	
A. C. L...	115	50	42	..	..	..	..	14	16	..	12	..	..	..	
Sou. Ry...	...	52	42	..	..	..	..	15	18	..	13	..	..	..	
A. C. L...	125	39	33	..	..	17	..	11	13	..	....	17	..	..	
Sou. Ry...	15	16	12	..	..	7	..	5	5	..	....	7	..	..	
Total.	...	55	45	..	..	24	..	16	18	..	....	24	..	..	
A. C. L...	140	52	46	..	..	24	..	15	17	..	....	24	..	..	
Sou. Ry...	140	56	46	..	..	..	..	16	19	..	....	..	..	..	
A. C. L...	150	41	35	28	22	18	..	12	14	..	10.5	18	22	22	25.5
Sou. Ry...	15	16	12	11	8	7	..	5	5	..	4.5	7	8	10	10.5
Total.	...	57	47	39	30	25	..	17	19	..	15	25	30	36	36
A. C. L...	165	55	48	40	30	26	..	16	19	..	15	26	30	36	36
Sou. Ry...	165	60	50	41	31	26	..	17	20	..	15	26	31	36	36
A. C. L...	5	9	..	6	5	5	4	4	4	5	5	..	..	..	
Sou. Ry...	20	18	..	12	10	8	6	5	6	8	9	..	..	..	
Total.	...	27	..	18	15	13	10	9	10	13	14	..	..	..	
A. C. L...	25	27	..	18	15	13	10	9	10	13	15	..	..	..	
Sou. Ry...	25	27	..	18	14	..	..	..	..	..	14	..	..	..	
A. C. L...	10	..	10	8	7	6	5	..	5	..	....	6	7	..	
Sou. Ry...	20	..	14	12	10	8	6	..	6	..	....	8	9	..	
Total.	...	..	24	20	17	14	11	..	11	..	....	14	16	..	
A. C. L...	30	..	24	20	18	14	11	..	11	..	....	14	18	..	
Sou. Ry...	30	..	24	20	..	..	..	..	..	..	....	..	16	..	
A. C. L...	15	..	12	..	8	7	..	..	6	..	....	7	8	..	
Sou. Ry...	20	..	14	..	10	8	..	..	6	..	....	8	9	..	
Total.	...	..	26	..	18	15	..	..	12	..	....	15	17	..	
A. C. L...	35	..	26	..	20	15	..	..	12	..	....	15	20	..	
Sou. Ry...	35	..	26	..	18	..	..	..	..	..	....	..	18	..	
A. C. L...	25	..	..	..	11	..	..	..	..	..	....	..	11	..	
Sou. Ry...	20	..	..	..	10	..	..	..	..	..	....	..	9	..	
Total.	...	..	..	..	21	..	..	..	..	..	....	..	20	..	
A. C. L...	45	..	..	..	22	..	..	..	..	..	....	..	22	..	
Sou. Ry...	45	..	..	..	..	..	..	..	..	..	....	..	20	..	

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	Miles.	1	2	3	4	5	6	A	B	C	D	E	H	F
A. C. L...	100	..	..	..	..	..	..	10	12	....	....	..	..	....
Sou. Ry...	20	..	..	..	..	..	..	5	6	....	....	..	..	....
Total. ...		..	..	..	..	..	..	15	18	....	....	..	..	....
A. C. L...	120	..	..	..	..	..	..	14	16	....	....	..	..	....
Sou. Ry...	120	..	..	..	..	..	..	15	18	....	....	..	..	....
A. C. L...	125	39	33	..	..	..	14	11	13	....	....	..	..	....
Sou. Ry...	20	18	14	..	..	..	6	5	6	....	....	..	..	....
Total. ...		57	47	..	..	..	20	16	19	....	....	..	..	....
A. C. L...	145	54	47	..	..	..	20	15.5	18	....	....	..	..	....
Sou. Ry...	145	58	48	..	..	..	..	16.5	19	....	....	..	..	....
A. C. L...	150	41	35	28	..	18	..	12	14	....	....	18	22	....
Sou. Ry...	20	18	14	12	..	8	..	5	6	....	....	8	9	....
Total. ...		59	49	40	..	26	..	17	20	....	....	26	31	....
A. C. L...	170	55	48	40	..	26	..	16	19	....	....	26	30	....
Sou. Ry...	170	60	50	41	..	26	..	17	20	....	....	26	31	....
A. C. L...	5	9	8	6	5	5	4	....	4	....	....	5	5	....
Sou. Ry...	25	20	15	14	11	9	7	....	7	....	....	9	11	....
Total. ...		29	23	20	16	14	11	....	11	....	....	14	16	....
A. C. L...	30	30	24	20	18	14	11	....	11	....	....	14	18	....
Sou. Ry...	30	30	24	20	15	..	..	....	..	....	....	..	16	....
A. C. L...	10	..	10	8	7	6	5	....	5	....	....	6	7	....
Sou. Ry...	25	..	15	14	11	9	7	....	7	....	....	9	11	....
Total. ...		..	25	22	18	15	12	....	12	....	....	15	18	....
A. C. L...	35	..	26	22	20	15	12	....	12	....	....	15	20	....
Sou. Ry...	35	..	26	22	18	..	..	....	..	....	....	..	18	....
A. C. L...	15	..	..	..	8	..	..	....	..	....	....	..	8	....
Sou. Ry...	25	..	..	..	11	..	..	....	..	....	....	..	11	....
Total. ...		..	..	..	19	..	..	....	..	....	....	..	19	....
A. C. L...	40	..	..	..	20	..	..	....	..	....	....	..	20	....
Sou. Ry...	40	..	..	..	..	..	..	....	..	....	....	..	..	....
A. C. L...	25	..	..	..	11	..	..	....	..	....	....	..	11	....
Sou. Ry...	25	..	..	..	11	..	..	....	..	....	....	..	11	....
Total. ...		..	..	..	22	..	..	....	..	....	....	..	22	....
A. C. L...	50	..	..	..	22	..	..	....	..	....	....	..	22	....
Sou. Ry...	50	..	..	..	..	..	..	....	..	....	....	..	..	....
A. C. L...	150	41	35	28	..	18	..	....	14	....	....	18	..	....
Sou. Ry...	25	20	15	14	..	9	..	....	7	....	....	9	..	....
Total. ...		61	50	42	..	27	..	....	21	....	....	27	..	....
A. C. L...	175	55	48	40	..	26	..	....	19	....	....	26	..	....
Sou. Ry...	175	61	51	42	..	28	..	....	21	....	....	28	..	....
A. C. L...	5	9	8	6	5	5	4	4	4	....	3	5	5	....
Sou. Ry...	30	23	18	15	12	10	8	6	8	....	6	10	12	....
Total. ...		32	26	21	17	15	12	10	12	....	9	15	17	....
A. C. L...	35	33	26	22	20	15	12	10	12	....	9	15	20	....
Sou. Ry...	35	33	26	22	18	..	..	....	..	....	9	..	18	....

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	Miles.	1	2	3	4	5	6	A	B	C	D	E	H	F
A. C. L...	10	..	..	..	7	..	..	....	..	....	....	..	7	....
Sou. Ry...	30	..	..	..	12	..	..	....	..	....	....	..	12	....
Total. ...		..	..	..	19	..	..	....	..	....	....	..	19	....
A. C. L...	40	..	..	..	20	..	..	....	..	....	....	..	20	....
Sou. Ry...	40	..	..	..	..	..	..	....	..	....	....	..	..	....
A. C. L...	15	..	..	..	8	7	..	....	..	....	....	7	8	....
Sou. Ry...	30	..	..	..	12	10	..	....	..	....	....	10	18	....
Total. ...		..	..	..	20	17	..	....	..	....	....	17	20	....
A. C. L...	45	..	..	..	22	17	..	....	..	....	....	17	22	....
Sou. Ry...	...	..	..	..	20	..	..	....	..	....	....	..	20	....
A. C. L...	20	..	..	..	10	..	..	....	..	....	....	..	10	....
Sou. Ry...	30	..	..	..	12	..	..	....	..	....	....	..	12	....
Total. ...		..	..	..	22	..	..	....	..	....	....	..	22	....
A. C. L...	50	..	..	..	22	..	..	....	..	....	....	..	22	....
Sou. Ry...	50	..	..	..	..	..	..	....	..	....	....	..	..	....
A. C. L...	25	..	..	..	11	..	..	....	..	....	....	..	11	....
Sou. Ry...	30	..	..	..	12	..	..	....	..	....	....	..	12	....
Total. ...		..	..	..	23	..	..	....	..	....	....	..	23	....
A. C. L...	55	..	..	..	23	..	..	....	..	....	....	..	23	....
Sou. Ry...	55	..	..	..	..	..	..	....	..	....	....	..	..	....
A. C. L...	150	..	..	..	..	18	..	....	..	....	....	18	..	....
Sou. Ry...	30	..	..	..	..	10	..	....	..	....	....	10	..	....
Total. ...		..	..	..	..	28	..	....	..	....	....	28	..	....
A. C. L...	180	..	..	..	..	26	..	....	..	....	....	28	..	....
Sou. Ry...	180	..	..	..	..	28	..	....	..	....	....	28	..	....
A. C. L...	5	..	..	..	5	..	4	....	4	....	....	..	5	....
Sou. Ry...	35	..	..	..	14	..	8	....	8	....	....	..	14	....
Total. ...		..	..	..	19	..	12	....	12	....	....	..	19	....
A. C. L...	40	..	..	..	20	..	12	....	12	....	....	..	20	....
Sou. Ry...	40	..	..	..	..	..	..	....	..	....	....	..	..	....
A. C. L...	10	..	..	..	7	6	5	....	5	....	....	6	7	....
Sou. Ry...	35	..	..	..	14	11	8	....	8	....	....	11	14	....
Total. ...		..	..	..	21	17	13	....	13	....	....	17	21	....
A. C. L...	45	..	..	..	22	17	13	....	13	....	....	17	22	....
Sou. Ry...	45	..	..	..	..	..	..	....	.	....	....	..	..	....
A. C. L...	5	..	8	6	5	5	4	4	4	....	....	5	5	....
Sou. Ry...	40	..	20	17	14	11	8	7	8	....	....	11	14	....
Total. ...		..	28	23	19	16	12	11	12	....	....	16	19	....
A. C. L...	45	..	28	24	22	17	13	11	13	....	....	17	22	....
Sou. Ry...	45	..	28	24	20	..	12	....	12	....	....	..	20	....
A. C. L...	10	..	..	..	7	6	5	....	5	....	....	6	7	....
Sou. Ry...	40	..	..	..	14	11	8	....	8	....	....	11	14	....
Total. ...		..	..	..	21	17	13	....	13	....	....	17	21	....
A. C. L...	50	..	..	..	22	17	13	....	13	....	....	17	22	....
Sou. Ry...	50	..	..	..	..	..	..	....	..	....	....	..	..	....

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	Miles.	1	2	3	4	5	6	A	B	C	D	E	H	F
A. C. L...	15	..	..	..	8	7	..	....	6	....	....	7	8	....
Sou. Ry...	40	..	..	..	14	11	..	....	8	....	....	11	14	....
Total. ...		..	..	..	22	18	..	....	14	....	....	18	22	....
A. C. L...	55	..	..	..	23	18	..	....	14	....	....	18	23	....
Sou. Ry...	55	..	..	..	..	..	..	....	..	....	....	..	..	....

Key.

First line of figures, A. C. L. locals less 25%.
Second line of figures, Southern Ry. locals less 25%.
Third line of figures, a combination of first and second.
Fourth line of figures, A. C. L. local for continuous distance.
Fifth line of figures, Southern Ry. local for continuous distance.

312 In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
vs.
FRANKLIN MCNEILL and Others, Defendants.

S. H. Hardwick, being first duly sworn deposes and says, he is Passenger Traffic Manager of the Southern Railway Company, and has been so for several years past, prior to which time he was General Passenger Agent of the Company, and occupied other positions in the passenger service of the Southern Railway Company; that he has read subsection B of the 5th paragraph of defendants' answer in this case; that it is untrue, as stated in said answer in this case; that it is untrue, as stated in said answer, that the Complainant now is and for many years has been giving free transportation in North Carolina as therein alleged; the free transportation which has been given by the Southern Railway Company in North Carolina has been to its officers its directors and employees, and members of their families, and interchange transportation with other lines, and has not been such giving of free transportation as is mentioned in said answer; that such transportation is transportation for which no charge could in the nature of things be made, and if it was made it would cost the company in the shape of wages or other payments, such as it would gain by it. And this affiant denies that there has been discrimination in passenger rates alleged in said answer.

The affiant further states that those rates which were less than its regular rates, were given as has been customary with all railroad companies for special occasions and for the purpose of accommodating pleasure travel, because we believe that such pleasure travel having it optional as to whether or not the traveler would go, would not go unless some special inducements by cheap rates were given, that the other lower rates mentioned in said answer not covered by the pleasure travel, were given in the nature of benevolence or charity, and in accordance with custom which has been universal with carriers for a large number of years; except that the mileage

rate was given for commercial purposes and with view of assisting and building up the general prosperity of the commercial public.

S. H. HARDWICK.

Subscribed and sworn to before me this 26th day of June 1907.

W. S. HYAMS,
[SEAL.] *Clerk U. S. Circuit Court.*

313 In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
v.
FRANKLIN MCNEILL ET AL., Defendants.

Affidavit.

W. H. Tayloe, being first duly sworn, deposes and says:

That he is, and has been for some years past, the General Passenger Agent of the Complainant Southern Railway Company; that he is well acquainted with the passenger tariff of the Complainant for the intrastate business of the Southern Railway Company in North Carolina that that tariff which now exists is the same which was in effect during the whole of the year ending June 30, 1906, and continuously since; that in no instance is said passenger tariff unjustly, unreasonably, or unfairly high, and in no instance is it greater, than a reasonable compensation for the service rendered in consideration thereof; and the affiant further states that the passenger tariff established by the act of the General Assembly of North Carolina ratified on the second day of March, 1907, in the bill in this cause mentioned, is unjustly, unreasonably, and unfairly low, and the rates therein prescribed would not furnish to the complainant, a fair, just, or reasonable compensation for the service rendered in consideration thereof, and would not afford to the complainant a just reasonable, or fair return upon its property used in performing the service. Affiant further says that if said rates were put into effect the revenues of the Complainant would be largely reduced and there would not be any such increase in the amount of its passenger business as would compensate the complainant for the loss of revenue resulting from the lower rate; and affiant further states that there would be no appreciable increase in its passenger business because of such lower rate.

W. H. TAYLOE.

DISTRICT OF COLUMBIA, *City of Washington, To-wit:*

I, Harry F. Pierce, a Notary Public, in and for the City of Washington, in the District of Columbia, do certify that W. H. Tayloe, whose name is signed to the foregoing affidavit, personally appeared before me in my City and District aforesaid, and made oath that the statements contained in the said affidavit are true.

My Commission as Notary Public expires on the 17th day of July 190–.

Given under my hand and official seal, this 8th day of May 1907.

HARRY F. PIERCE,
Notary Public.

[SEAL.]

314 U. S. Circuit Court. Filed Jun- 26, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
vs.
FRANKLIN MCNEILL ET AL., Defendant-.

Affidavit.

The affiant, A. H. Plant, being duly sworn, deposes and says:

That he is, and for some time has been, Comptroller of the Southern Railway Company, and as such has supervision over its accounts, and charge of its books, and that the following is a true statement of the results of operation of Southern Railway Company in North Carolina during the year ended June 30, 1906, under the rates and classifications existing at that time:

Gross earnings from operation in North Carolina including both interstate and intrastate.	$12,043,727.13
Operating cost to earn one dollar on intrastate revenue in North Carolina was not less than.	86.35¢

While it is impossible to state the exact cost to earn a dollar of intrastate revenue, it is certain that it cost much more than the average cost to do all business, and at least the above mentioned figures, as this affiant verily believes.

315 Gross earnings in North Carolina from intrastate traffic:

From passengers	$1,565,695.33	
From freight	1,322,564.30	
From mail	230,383.78	
From express	169,474.89	
From miscellaneous	36,507.44	
Total gross revenue from intrastate traffic in North Carolina for said year		$3,324,625.74
Minimum expense of earning this gross intrastate revenue, on the basis of 86.35¢ to earn one dollar.		2,870,814.33
Maximum net earnings from intrastate traffic in North Carolina for said year, without allowing for taxes		$453,811.41

Taxas chargeable to North Carolina for the fiscal year ended June 30, 1906, were...	$269,651.18	
The proportion of intrastate gross earnings to total gross earnings in North Carolina was 27.60%.		
27.60% of the total taxes above mentioned which should be charged to intrastate traffic shows intrastate taxes to have been for that year	$74,423.73	
Improvements and betterments not capitalized chargeable to North Carolina during the year for the purpose of keeping the property up to modern standard and without additions to it, amounted to	$197,945.81	
27.60% of which is assignable to intrastate traffic or	$54,633.04	
Total taxes and improvements and betterments not capitalized chargeable against intrastate traffic for said year		129,056.77
Leaving as the maximum net intrastate earnings in North Carolina for said year, after deducting the said proportion of taxes and the said proportion of improvements and betterments not capitalized.		$324,754.64
Applying to the above mentioned intrastate business in North Carolina for the year ended June 30, 1906, the passenger and freight rates proposed by the acts of the Legislature of North Carolina passed during March of the current year, there would have been a loss of passenger revenue of	$275,055.53	
And a loss in freight revenue of.....	21,691.64	
Or a total of.....		296,747.17
Making the net earnings from intrastate operations under the proposed rates and classifications.....		$28,007.47

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During the said year the value of the physical properties of this company in North Carolina according to the assessment made by the State for the purpose of taxation was.....	$26,134,865.00	
The proportion of this tax value used for intrastate purposes should be ascertained on the basis of user, which is on the basis of the proportion of gross earnings from intrastate business to the total gross earnings for all business for said year in North Carolina, or 27.60% of the said assessed value, which amounts to.....		7,213,222.74

The maximum net revenue from intrastate traffic in North Carolina under the existing rates would only yield an interest upon said proportion of said tax value, per annum	4.50%
Under the proposed rates and classifications the net revenue from intrastate traffic in North Carolina would only yield as interest upon said proportion of said tax value, per annum	.39%

The affiant further says that the foregoing results of operation in the State of North Carolina for the year ended June 30, 1906, show a larger net result to the Company than is fairly representative of the results of the Company's operations in the future, for the reason that since the thirtieth day of June, 1906, the close of said fiscal year, there has been a large increase in the expenses of the Company, due to increases in wages, and to the increase in cost of all material and supplies and other expenses, as will be shown by the following statement for the system; and that such increase in expenses has been relatively much larger than the increase in gross earnings:

For ten months ended April 30, 1907, the gross earnings of the Company increased over the same period for the previous year	$2,406,517.82
Whereas the operating expenses and taxes increased for the same period	4,615,139.50
Showing a decrease in net earnings for the ten months mentioned of	2,208,621.68

The results of operations with respect to intrastate business in North Carolina for the nine months ending March 31, 1907, (which is all of the present fiscal year for which the figures are now available) are as follows, as compared with results of operation
317 with respect to intrastate business in North Carolina for the corresponding period of the preceding year:

Statement of Results of Operation of Southern Railway Company in North Carolina During Nine Months Ended March 31, 1907, under Rates and Classifications Existing at that Time.

Gross earnings in North Carolina from intrastate traffic:

From passengers	$1,315,383.77	
From freight	1,033,691.12	
From mail	166,532.49	
From express	143,707.50	
From miscellaneous	32,881.31	
Total gross revenue from intrastate traffic in North Carolina for said nine months		$2,692,196.19
Minimum expense of earning this gross intrastate revenue, on the basis of 90.53¢ to earn one dollar		$2,437,245.21

Maximum net earnings from intrastate traffic in North Carolina for said nine months, without allowing for taxes		
Taxes chargeable to North Carolina for the nine months ended March 31, 1907, were $209,762.60		254,950.98
The proportion of intrastate gross earnings to total gross earnings in North Carolina was... 28.74%		
28.74% of the total taxes above mentioned which should be charged to intrastate traffic shows intrastate taxes to have been for the nine months	$60,285.77	
Improvements and betterments not capitalized chargeable to North Carolina during the nine months for the purpose of keeping the property up to modern standard and without additions to it, amounted to	$83,155.71	
28.74% of which is assignable to intrastate traffic of	$23,989.95	
Total taxes and improvements and betterments not capitalized chargeable against intrastate traffic for said nine months		$84,184.72
Leaving as the maximum net intrastate earnings in North Carolina for said nine months, after deducting the said proportion of taxes and the said proportion of improvements and betterments not capitalized		$170,766.26

318 *Statement of Results of Operation of Southern Railway Company in North Carolina During Nine Months Ended March 31, 1906, under Rates and Classifications Existing at that Time.*

Gross earnings in North Carolina from Intrastate traffic:

From passengers	$1,158,398.44	
From freight	979,501.79	
From mail	171,917.61	
From express	123,466.64	
From miscellaneous	23,828.01	
Total gross revenues from intrastate traffic in North Carolina for said nine months..		$2,457,112.49
Minimum expense of earning this gross intrastate revenue, on the basis of 83.74¢ to earn one dollar.		2,057,586.00
Maximum net earnings from intrastate traffic in North Carolina for said nine months without allowing for taxes		$399,526.49

Taxes chargeable to North Carolina for the nine months ended March 31, 1906, were	$199,047.64	
The proportion on intrastate gross earnings to total gross earnings in North Carolina, was 27.35%.		
27.35% of the total taxes above mentioned which should be charged to intrastate traffic shows intrastate taxes to have been for the nine months	$54,439.53	
Improvements and betterments not capitalized chargeable to North Carolina during the nine months for the purpose of keeping the property up to the modern standard and without additions to it, amounted to	$119,931.49	
27.35% of which is assignable to intrastate traffic, or	$32,801.26	
Total taxes and improvements and betterments not capitalized chargeable against intrastate traffic for said nine months		87,240.79
Leaving as a maximum net intrastate earnings in North Carolina for said nine months after deducting the said proportion of taxes and the said proportion of improvements and betterments not capitalized		$312,285.70

Affiant states that on account of the greatly increased cost of doing business in the State of North Carolina for the period of nine months ended March 31, 1907, the cost of earning a dollar of intrastate revenue was at least correspondingly increased and was not
319 less than the figures of 90.53¢ used in the foregoing statement with respect to said period of nine months.

It has not been practicable to make an accurate estimate of the loss of revenue which would have resulted from applying to the above mentioned intrastate business in North Carolina for said period of nine months the passenger and freight rates proposed by the acts of the Legislature of North Carolina passed during March of the current year, but affiant believes that said losses would have been proportionately the same as are above shown with respect to the year ended June 30, 1906.

(Signed) A. H. PLANT.

DISTRICT OF COLUMBIA, *City of Washington, To wit:*

I, Alfred H. Oliver, a Notary Public in and for the City of Washington in the District of Columbia do certify that A. H. Plant, whose name is signed to the foregoing affidavit, personally appeared before me in my City and District aforesaid, and made oath that the statements contained in the said affidavit are true.

My commission as Notary Public expires on the 18th day of August, 1911.

Given under my hand and official seal this 24th day of June, 1907.

[NOTARY SEAL.] (Signed) ALFRED H. OLIVER,
Notary Public.

320 U. S. Circuit Court. Filed Jun- 26, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
v.
FRANKLIN MCNEILL ET AL., Defendants,

Affidavit.

C. H. Ackert, being first duly sworn deposes and says that he is Vice-President and General Manager of the complainant Southern Railway Company; that he has had experience in railroad life for about thirty-five years, having been for about eighteen years connected with the duties of management of several railroads; that in the year 1902 he became General Manager of the Southern Railway Company, and has occupied that position ever since, with the exception of about one year and seven months, during which time the General Manager of the company reported to him as Vice-President and as such Vice-President, during said excepted period, he had general charge of the operating department of the railroad;

That during all the time that he has been connected with the said Company, its railway has been and is now skilfully, honestly and economically managed and operated; that the officers, agents and employees have at all times used all *responsible* efforts to pro-
321 cure freight, passenger, mail, express and other traffic, that the gross earnings of the railway company from all kinds of traffic, both state and interstate, have been as large as was reasonably practicable to make them under the circumstances and conditions surrounding the company; that the operating expenses and other expenses have been kept as low as practicable, having in view the safe operation of trains and the proper maintenance of the property for public service; that the supplies, material and labor used for these purposes have been procured at as low a price as was reasonably practicable; that the amount paid by the company for general officers' salaries and for employees' wages has been as low as practicable, considering the necessity for employing competent officers and employés; that the company has at all times confined its operating expenses, its taxes, its interest charges and every other expenditure within the lowest and narrowest limits reasonably practicable, under the existing conditions;

That as the result of operation of the Southern Railway system for the last two fiscal years during which the earnings of the com-

pany were greater than for any previous year of the company's existence, its net earnings, after paying operating expenses, taxes, and interest on its bonds, and before paying any dividends whatever on any class of its stock, were respectively as follows:

For the year ended June 30, 1905.....	$5,151,632.00
For the year ending June 30, 1906.....	5,229,065.97

After paying a dividend of five per cent. on its preferred stock and no dividend on its common stock, the surplus during these years was as follows:

322	For the year ended June 30, 1905.....	$2,151,632.00
	For the year ended June 30, 1906.....	2,229,065.97

That since the close of the fiscal year ended June 30, 1906, the expenses of the company have enormously increased, and this has been largely due to increase in wages, to increase in cost of all material and supplies, to increased expense of operation due to overtime incident to congested conditions of traffic and limited track and other facilities for the handling of the business; that such increases in wages since the first day of July, 1906 (the amounts here given being estimated for the current fiscal year and approximately correct) have been as follows:

Engineers and firemen.....	$278,400.00
Hostlers	24,000.00
Trainmen	301,200.00
Yardmen	50,400.00
Operators	60,000.00
Shopmen	228,000.00
Trackmen and bridgemen.....	102,000.00
	$1,044,000.00

In addition to the above increases there have been *been* increases in agents' and clerks' pay, and in the pay of other employees; that the increase in the price of supplies, etc., may be illustrated as follows:

Since 1898, bridge timber has increased from $9.36 to $20.52 per thousand feet; crossties from 28¢ to 34½¢ per tie; steel rails from $17.75 per ton to $28.00 per ton; locomotives from $11,392 to from $16,000 to $20,000; passenger coaches from $6,315 to $9,468; freight cars from $500.43 to $765; coal cars from $368. to $1,135; the cost of labor has increased per mile of road from
323 $1,621.67 in 1895 to $2,874.71 in 1906, and from $2,513.64 per mile of road in 1905 to $2,874.71 in 1906; that the taxes of the company per mile of road have since 1895 increased 63.41 per cent.;

That the management is putting forth its utmost exertion to reduce the expenses as much as possible, but it is manifest that, with

all the increased expenses, it is impossible at the same time to substantially reduce the company's revenue; that it is to the interest, not only of the company but of the public, that its dividends should be continued so as to establish the company's credit upon a basis which will enable it to increase its facilities for handling the business tributary to its lines; that as a result of the efforts to reduce the revenues of the carriers generally the credit of the railroad companies has been greatly impaired; that it is impossible to keep the facilities of the company up to the requirements of the public business without a stable and reliable credit, and that it is impossible to establish and maintain such credit if the revenues of the company are to be, to any considerable extent, reduced; that these figures, while given for the System, are proportionately true for the State of North Carolina;

That the effect of what is known as the North Carolina sixteen hour law will be to increase the expenses at every block office where it is in force by fifty per cent.; and that as to trainmen the increase in expense would be very substantial and material, although the full amount of it is impossible at present to estimate; the reason for this increase as to trainmen growing, in the opinion of this affiant, out of the necessity for changing the lengths of the several divisions over which the trains run, which will necessitate an enormous outlay and will involve additional equipment and additional
324 men to operate trains. The full amount of this has not yet been figured out and an estimate for the system is now being prepared.

(Signed) C. H. ACKERT.

DISTRICT OF COLUMBIA, *City of Washington, To wit:*

I, Harry F. Pierce, a Notary Public, in and for the City of Washington, in the District of Columbia, do certify that C. H. Ackert, whose name is signed to the foregoing affidavit, personally appeared before me in my City and District aforesaid, and made oath that the statements contained in the said affidavit are true.

My commission as Notary Public expires July 17, 1910.

Given under my hand and official seal this 24th day of June, 1907.

(Signed) HARRY F. PIERCE, [SEAL.]
Notary Public.

325 U. S. Circuit Court. Filed Jun. 26, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,
vs.
FRANKLIN MCNEIL ET AL., Defendants.

STATE OF NORTH CAROLINA, *County of Buncombe:*

Personally appeared before me A. H. Plant, who first being duly sworn deposes and says:

That he is Comptroller of Southern Railway Company and as such is in charge of its Accounting Department, and that the following table was prepared under his directions and supervision and is true to the best of his knowledge and belief:

Statement Showing Population—Total Railway Earnings and Average Earnings per Capita in Certain States.

State.	Year.	Population 1900.	Total railway earnings.	Earnings per capita.
Connecticut	1906	908,420	$ 55,810,518.53	$ 61.44
Massachusetts	1906	2,805,346	105,751,066.00	37.70
Pennsylvania	1906	6,302,115	713,431,278.00	113.21
New York	1905	7,268,894	334,434,456.34	46.01
Virginia	1905	1,854,184	39,023,547.94	21.05
North Carolina	1906	1,893,810	25,638,552.45	13.54
Georgia	1906	2,216,331	37,106,555.77	16.74
Alabama	1903	1,828,697	27,615,567.99	15.10
Ohio	1904	4,157,545	115,923,167.36	27.88
Illinois	1905	4,821,550	141,454,459.00	29.34

(Signed) A. H. PLANT.

Subscribed and sworn to before me this 26 day of June, 1907.

[SEAL.] (Signed) W. S. HYAMS,
Clerk U. S. Circuit Court.

326 U. S. Circuit Court. Filed Jun. 26, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
vs.
FRANKLIN MCNEIL ET AL., Defendants.

H. B. Spencer, being first duly sworn, deposes and says:

That he is Vice-President of the Southern Railway Company, that he has had experience in railroad service, as clerk in the Superintendent's office, as Chief Clerk, as Assistant Superintendent in charge of transportation, as Superintendent of the St. Louis-Louisville Divisions of the Southern Railway Company, as Assistant General Manager, St. Louis-Louisville Lines, Southern Railway Company, as General Manager of those lines, and as General Manager of the Eastern and Western Districts of the Southern Railway Company, besides his duties pertaining to his present position as Vice-President of said Company; that he has had much practical experience in the management of railroads and the cost of operation;

That this traffic of Southern Railway in North Carolina can be divided as follows:

1. Interstate traffic, which moves from beyond one border to beyond the other border of the State; 2. Interstate traffic which originates in North Carolina and is destined to a point outside of the State, or which originates outside of the State and is
327 destined to points within the State; or which in the course of its transportation from a point in North Carolina to another point in North Carolina passes outside of the borders of the State; 3. The traffic which originates at a point in North Carolina not going outside of the borders of the State, and is destined to another point in North Carolina, this third class of traffic being known as intrastate traffic. All of this latter class of traffic of the Southern Railway Company in North Carolina, practically speaking, is local traffic handled on local trains, the exceptions being for practical purposes negligible.

The cost of handling local traffic is greater than the cost of handling the general traffic, for the reason that the starting and stopping of trains add to the wear and tear of equipment, and we get less use from equipment per unit of dollar earned. We have to pay higher wages for the short haul then we do for the long through hauls; we are unable to handle as many tons per train of local traffic as we do on the through trains, consequently the unit of cost is higher on the local trains; that the unit of cost at stations considering the miles hauled of a ton of traffic is greater on the local traffic and this adds materially to the cost of handling local traffic and it varies considerably! In some instances this excess cost at stations for local traffic will run as high as three or four times what it will cost to

do the general business; in other cases it will be less than that, probably in no event less than double what it cost to do the general business.

That a local train is started out with traffic that has to be distributed at local stations, and of course this traffic only moves part of the distance. The local trains set out — this traffic and pick up other traffic, but the character of the traffic and the places
328 at which we have to pick it up are such that we cannot keep the train full to the maximum tonnage consequently, instead of the train going over the road with full tonnage, it averages materially less than the through train and materially less than the general average, varying with the differing conditions.

That of the cost of earning a dollar on the system at least thirty eight to forty cents is the cost of conducting transportation, the balance of the expense being divided between maintenance of way and structures, maintenance of equipment, and general expenses.

That while the wear and tear on the track and on the equipment is greater for local trains than for through trains, because of the more frequent starts and stops, I will eliminate this difference for purposes of the calculation about to be made. About half of the cost of conducting transportation of thirty-eight to forty cents, namely, nineteen or twenty cents is directly attributable to train movement. It consists of the engineer's wages, the wages of the other trainsmen, the cost of coal consumed and other costs. This portion of the cost of conducting transportation fluctuates directly with the business, that is, if we do not run the train we do not have the expense, and if we run that particular train we do have that expense. The other portion of the cost of conducting transportation is expenses such as station agents, telegraph operators, superintendents, and miscellaneous items that come in to make up the total cost of conducting transportation. These latter do not fluctuate with the business, and cannot be varied from day to day as the traffic varies, as you can your train service. This cost of nineteen or twenty cents of conducting transportation which fluctuates with the trains will fluctuate directly as between local and through business. As indicated above, the local service for this par-
329 ticular item, which fluctuates with the movement, costs from two to four and perhaps more than five times as much in the case of the local train as it does for the through train per unit of cost, but for the purposes of this statement I feel entirely safe in saying that, so far as the Southern Railway is concerned our local service will cost at least double what the general average service will cost with respect to this item of conducting transportation.

In other words, this nineteen or twenty cents which it costs on the general average service will, for local service, be at least thirty eight of forty cents, and the excess cost of doing local business is at least nineteen or twenty cents, and may be and I think is, considerably over that. This is the minimum cost, in my judgment, for doing the local traffic as compared with the general average of the traffic company.

Considering the fact that this excess of the cost of local as compared with through, in this particular item of cost, may run as high as three, four and five times, and even more than five times as much for the local as for the through, I feel safe in saying that the cost of doing the local business including both passengers and freight, is at least nineteen or twenty cents more to earn a dollar than the average cost to earn a dollar from all business.

That the bulk of the intrastate passenger business in North Carolina is done on local trains; some of it is of course done on through trains which pick up passengers at one point in the state and put them down at another point. As to the cost of doing the local passenger business as compared with the through passenger business, on through trains, it is difficult for me to make any intelligent comparison, but it is found by experience of the Southern Railway Company in North Carolina that the earnings on the local
330 passenger trains in that State on which the great bulk of the intrastate passenger business is done is very much less per train mile than the earnings from the through trains in the same state. In fact they are frequently as much as fifty cents less per train mile, and while there may be some trains doing local business in North Carolina that earn enough to pay the train expenses, I am convinced that, taking the intrastate passenger business as a whole in North Carolina, the average cost of the train is greater than the average earnings of the train. This is to a considerable extent due to the fact which we find true in experience that if a local train starts out with a pretty good load of passengers it will be distributing them along at nearby points until the load becomes practically exhausted, and that then there will be an interval more or less extended, but very substantial and appreciable, during which the train will run practically empty, and as it approaches its other destination, which is probably at some populous center, it will begin to pick up passengers, and will increase its load as it approaches the point of destination, but when the whole load is averaged it is found that the number of passengers which the train carries per mile for the whole mileage of its run is very small, consequently, earnings from the train are correspondingly thin. As an element of the cost it should also be remembered that the local passenger trains make very much more frequent stops, with corresponding wear and tear upon the equipment and track, and that it takes longer to cover the same distance than the through trains, and consequently the consumption of fuel is continuing during stops: that there is comparatively small difference in the rate of speed between stations of local passenger trains and through passenger trains.

(Signed) H. B. SPENCER.

331 Subscribed and sworn to before me this 26th day of June, 1907.

[SEAL.] (Signed) W. S. HYAMS,
Clerk U. S. Circuit Court.

332 U. S. Circuit Court. Filed Jun- 26, 1907. W. S. Hyams, Clerk.

In the District Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
vs.
FRANKLIN McNEILL ET AL., Defendants.

Affidavit.

The affiant, A. H. Plant, being duly sworn, deposes and says:

That he is, and for some years past has been, Comptroller of the Southern Railway Company and as such has supervision over its accounts, and charge of its books, and that the following is a true statement of the results of operation of Southern Railway Company in North Carolina during the year ended June 30, 1906, under the rates and classifications existing at that time:

Gross earnings from operation in North Carolina, including both interstate and intrastate.	$12,043,727.13
Operating cost to earn one dollar of intrastate revenue in North Carolina was not less than.	86.35¢

While it is impossible to state the exact cost to earn a dollar of intrastate revenue, it is certain that it cost much more than the average cost to do all business, and at least the above mentioned figures, as this affiant verily believes.

333 Gross earnings in North Carolina from intrastate traffic:

From passengers	$1,565,695.33	
From freight	1,322,564.30	
From mail	230,383.78	
From express	169,474.89	
From miscellaneous	36,507.44	
Total gross revenue from intrastate traffic in North Carolina for said year		$3,324,625.74
Minimum expense of earning this gross intrastate revenue, on the basis of 86.35¢ to earn one dollar		2,870,814.33
Maximum net earnings from intrastate traffic in North Carolina for said year, without allowing for taxes		$453,811.41
Taxes chargeable to North Carolina for the fiscal year ended June 30, 1906, were	$269,651.18	
The proportion of intrastate gross earnings to total gross earnings in North Carolina was 27.60%.		

27.60% of the total taxes above mentioned which should be charged to intrastate traffic shows intrastate taxes to have been for that year	$74,423.73	
Improvements and betterments not capitalized chargeable to North Carolina during the year for the purpose of keeping the property up to modern standards and without additions to it, amounted to	$197,945.81	
27.60% of which is assignable to intrastate traffic, or	$54,633.04	
Total taxes and improvements and betterments not capitalized chargeable against intrastate traffic for said year		129,056.77
Leaving as the maximum net intrastate earnings in North Carolina for said year, after deducting the said proportion of taxes and the said proportion of improvements and betterments not capitalized		$324,754.64
Applying to the above mentioned intrastate business in North Carolina for the year ended June 30, 1906, the passenger and freight rates proposed by the acts of the Legislature of North Carolina passed during March of the current year, there would have been a loss in passenger revenue of	$275,055.53	
And a loss in freight revenue of	21,691.64	
Or a total loss of		296,747.17
Making the net earnings from intrastate operations under the proposed rates and classifications		$28,007.47
During the said year the value of the physical properties of this Company in North Carolina, according to the assessment made by the State for the purpose of taxation, was		$26,134,865.00
The proportion of this tax value used for intrastate purposes should be ascertained on the basis of user, which is on the basis of the proportion of gross earnings from intrastate business to the total gross earnings from all business for said year in North Carolina, or 27.60% of the said assessed value, which amounts to		7,213,222.74
The maximum net revenue from intrastate traffic in North Carolina under the existing rates would only yield as interest upon said proportion of said tax value, per annum		4.5%
Under the proposed rates and classifications the net revenue from intrastate traffic in North Carolina would only yield as interest upon the said proportion of said tax value, per annum		.39%

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The affiant further says that the foregoing results of operation in the State of North Carolina for the year ended June 30, 1906, show a larger net result to the Company than is fairly representative of the results of the Company's operations in the future, for the reason that since the thirtieth day of June, 1906, the close of said fiscal year, there has been a large increase in the expenses of the Company, due to increases in wages, and to the increase in cost of all material and supplies and other expenses, as will be shown by the following statement for the system:

For the six months ended December 31, 1906, the gross earnings of the Company increased over the same period of the previous year.....	$1,711,861.79
Whereas the operating expenses and taxes increased for the same period.....	2,623,979.77
Showing a decrease in net earnings for the six months mentioned of.....	912,117.98

335 In addition to the foregoing increases in wages and other expenses, the Company is confronted with still further very substantial demands for increases in wages. While the above figures are for the system, a proportionate part of said increase in expenses would apply to North Carolina.

(Signed) A. H. PLANT.

DISTRICT OF COLUMBIA, *City of Washington, To wit:*

I, Alfred H. Oliver, a Notary Public, in and for the City of Washington, in the District of Columbia, do certify that A. H. Plant, whose name is signed to the foregoing affidavit, personally appeared before me in my City and District aforesaid, and made oath that the statements contained in the said affidavit are true.

My commission as Notary Public expires on the 18th day of August, 1911.

Given under my hand and official seal, this 8th day of May, 1907.

[NOTARY SEAL.] (Signed) ALFRED H. OLIVER,
Notary Public.

336 U. S. Circuit Court. Filed Jun- 26, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
vs.
FRANKLIN MCNEILL ET AL., Defendants.

Affidavit.

S. H. Hardwick, being first duly sworn, deposes and says, that he is Passenger Traffic Manager of the Southern Railway Company; that

he has occupied that position since the first day of May, 1904; that prior to that time he was, from January first, 1901, General Passenger Agent of said Company, and prior to January first, 1901, Assistant General Passenger Agent of the same Company for seven years, and prior to that time was Assistant General Passenger Agent of the Richmond and Danville for a number of years, and has been engaged in passenger business altogether for about twenty-eight years;

That the rates of passenger charges for the Southern Railway Company now in force for intrastate business in North Carolina are respectively three and one-fourth cents per mile for first class passengers and two and three-fourths cents per mile for second class passengers; that the said rates were fixed by the Corporation Commission of North Carolina under the law of that State which required said Commission to make reasonable and just rates of freight and passenger charges over the lines of railroad in that state, including the lines of the complainant, and this affiant says that at the time said rates
337 were so fixed by the Commission the cost of performing the passenger service of the Company was greatly less than at present, and since they were so fixed such cost has largely increased by reason of the increase in cost of labor, the increase in the cost of material, and the increase in the cost of everything which a railroad company is required to buy to perform such service.

Affiant further says that the said rates are not higher than a reasonable compensation for the service rendered by it to the travelers on its lines, and that they are not higher than are just and reasonable, whether considered from the standpoint of the service rendered, or from the standpoint of rates charged on other railroads and in other jurisdictions for similiar services, and they are in no sense excessive or extortionate; that they are not unjustly, unduly, unreasonably, or illegally discriminating as between individuals, nor as between localities, and that, in view of the increased expense aforesaid, said rates should, in order to be now just and reasonable, be increased, instead of being decreased; that the interstate rates of the company are made, and necessarily made, upon a combination of locals, or by the use of locals as factors, and that, unless this were so, it would be possible for a passenger to buy a ticket from a point outside of the state to a point just across the border within the state, and then buy a second ticket from the latter point to some other point within the state, and that in consequence the interstate passenger business of this company would be greatly affected, and its rates for such interstate service largely reduced by the rates proposed in the said act in respect to passenger service.

This affiant further says that he has had a large experience in passenger business, and that he is convinced that there will be
338 no compensatory increase in the passenger business of the company resulting from the proposed reduced rates, and that there will be no appreciable or substantial increase whatever in such business due to such reduced rates; that if there should be an increase in the passenger travel sufficient to make up the loss in gross revenue, such increased travel could not be accommodated without large in-

crease in the facilities, and consequent increases in expense, for the reason that a carrier must at all times be provided with facilities to handle the maximum amount of passenger travel that may be reasonably expected, and cannot limit its facilities only to the average travel, and if there should be a very large increase in the number of passengers the present maximum would be correspondingly increased, and in consequence of such increase in the present maximum of travel there would be a necessity for increase in facilities to accommodate it; that the lines of the Company in North Carolina run through a sparsely populated section, in which the average population per square mile is only forty six whereas the average population per square mile in the state of Ohio is one hundred and five, in the State of Pennsylvania is one hundred and forty-seven, in the State of New York is one hundred and sixty, and in the State of Massachusetts is three hundred and seventy, and that in such a sparsely settled country it is impossible by low rates to so stimulate passenger travel as to create a substantial additional volume; that such business as can be stimulated by low rates is excursion business, and business for special occasions, in respect to which the company now offers, and for many years has offered, rates very much below its regular rates, and very much below the rates proposed in said act; that such business cannot be preserved if the rates now being charged for it are increased up to the rates proposed in the said bill.

That the proposed passenger act provides for a free baggage allowance of two hundred pounds, whereas, now, the free baggage
339 allowance is only one hundred and fifty pounds, and that the loss of revenue on this account has not been included in the figures given for the decrease incident to the said reduction of rates, and approximately the loss from this item of increased baggage allowance, for intrastate points alone, will amount to $30,517.00 per annum, if all passengers carrying baggage should take advantage of the full increased baggage allowance.

(Signed) S. H. HARDWICK.

DISTRICT OF COLUMBIA, *City of Washington, To wit:*

I, Harry F. Pierce, a Notary Public, in and for the City of Washington, in the District of Columbia, do certify that S. H. Hardwick, whose name is signed to the foregoing affidavit, personally appeared before me in my City and District aforesaid, and made oath that the statements contained in the said affidavit are true.

My commission as Notary Public expires July 17, 1910.

Given under my hand and official seal, this 24th day of June, 1907.

(Signed) HARRY F. PIERCE.
[NOTARY SEAL.] *Notary Public.*

COPY BOUND CLOSE

340 U. S. Circuit Court. Filed Jun- 26, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

SOUTHERN RAILWAY COMPANY, Complainant,

vs.

FRANKLIN MCNEIL, SAMUEL L. RODGERS, E. C. BEDDINGFIELD, A. D. GILMER, and HAYDEN CLEMENT, the First Three Constituting the Corporation Commission of North Carolina, and the said R. D. Gilmer, Holding the Position of Attorney General of North Carolina, and the said Hayden Clement, Holding the Position of Assistant Attorney General of North Carolina.

Affidavit.

J. W. Cone, being first duly sworn, deposes and says: That he is a resident of the City of Greensboro, North Carolina; that he is Vice-President of the Proximity Manufacturing Company; that I is resided in the said City of Greensboro for about twelve years. at he is also interested in many other enterprises in and around the said City of Greensboro and in the County of Guilford and elsewhere; that by reason of his position in the industrial world and in the world of trade, he is familiar with and knows the usual and ordinary rate of interest received and demanded upon money loaned upon good security in the section of North Carolina in which affiant lives; and that the usual and ordinary rate of interest is six per cent.; that this affiant is familiar with what is considered a fair earning upon money invested in industrial business or manufacturing and that this affiant would consider ten per cent. upon the capital stock or upon the money invested a very low average rate or earning for money invested in trade or manufactories or commerce in that section of the state in which affiant lives, in which the business is economically operated and conducted with average skill, and this affiant
341 knows of many instances where a rate of earning is much higher than ten per cent.; and that affiant is not in any way connected with or interested in any railway company and particularly the Southern Railway Company.

(Signed) JULIUS W. CONE.

Sworn and subscribed to before me this the 15 day of June, 1907.

[NOTARY SEAL.] (Signed) THOMAS S. BEALL, *N. P.*

I CENTER

342 U. S. Circuit Court. Filed Jun. 26, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Eastern District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,

vs.

FRANKLIN McNEIL ET ALS.

The affiant, A. J. Earling, states that he is President of the Chicago, Milwaukee & St. Paul Railway Company, with office at Chicago, Illinois.

He states that he has been in the railroad business holding various positions, since the Spring of 1865; and that during all of his railway service, in order to perform his duties, it has been necessary for him to consider, examine, and determine questions affecting the transportation business upon the railways with which he has been connected, and that the transportation business has been his principal business during his connection with said railways. He states that it is not possible for any one charged with the duties of maintenance, operation, providing of equipment, and the conduct of the transportation business, to do so successfully without the most careful and laborious effort in the direction of efficiency and economy; and that it requires years and years of experience to operate and maintain a railroad efficiently, to render proper service and do it economically; and that it requires not only experience but constant and vigilant attention. He states that he has given a great deal of consideration for many years to the relative transporta-

343 tion expense of local and through traffic and that from his experience and the study which he has given to that subject he states that he has found that in proportion to the earnings it costs at least twice or three times as much to do the local business of a railroad as it does to do the through business; for instance, in doing the local business the train starts out from its terminus with a very small amount of freight—perhaps one, two or three cars, as the case may be, perhaps none at all,—and, as the train proceeds to the end of the run, it picks up freight and cars here and there. If there is traffic enough on the line to fill out that train to the capacity of the locomotive when it shall reach the end of its run, then starting in with little or no freight from the beginning of its run and ending at the destination of the train at the end of its run with a full train, there is an average of one-half load over the entire part of the line over which the train runs. There will not have been more than half a load for that locomotive spread over the entire run of the train. It sometimes happens that there is not sufficient traffic to fill the train going over the entire run, and the train frequently arrives at the end of the run with only—say, 25 per cent. of a full load, sometimes less. Therefore, in such a case the expense in proportion to the earnings is increased *many* times. This therefore, shows conclusively that in proportion to the earnings its costs at least two or three times as much, and some railroad experts have put it at four times as much, to do the local business as it does to do the through business. Affiant states it frequently oc-

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EXHIBIT G.

Filed in this office, July 20, 1907, W.S.Hyams, Clerk.

In re Jas. H. Wood.

The Weather
Showers.

THE ASHEVILLE CITIZEN.

Something to sell ?
Use Citizen Want Ads.

Vol. XXII. No 219 Asheville, N.C. Price Five Cents.
Saturday Morning, July 20, 1907.

$30,000 Fine against Southern.

President Finley and Gen. Counsel Humphrey arrive on Special Train.

Sensational Trial is Ended Without Interference By Judge Pritchard.

A NOMINAL FINE IS IMPOSED ON GREEN

leav udge Long

Arguments.

The arguments today were by F. H. Busbee, Ex-Judge A. C. Avery, and General Counsel A. P. Thom, of the Southern for the defense tnd E. J. Justice and Ex-Governor Charles B. Aycock for the prosecution. Ex-Judge Avery for the defense said that forty years ago he fought battles for state rights young man. And through all these years of his professional and judicial service on the bench he had given his time to efforts to fix the lines between the state and the federal court

AGENT GREEN RESIGNS HIS POSITION

Vol. XXII, No 219. Asheville, N.C. Price Five Cents.
Saturday Morning, July 20, 1907.

$30,000 Fine against Southern.

President Finley and Gen. Counsel Humphrey arrive on Special Train. leav udge Lon

Sensational Trial is Ended Without Interference By Judge Pritchard.

A NOMINAL FINE IS IMPOSED ON GREEN

Southern Has Ten Days In Which to Appeal From Fine Imposed.

Special to The Citizen.

RALEIGH, July 19.—The sensational indictment and trial of the Southern Railway Company and City Ticket Agent Green for violating the new State 2 1-4 cent passenger rate law with the threatened interference of Federal Circuit Court process to arrest trial in the State court, terminated this evening in the State court with a verdict of guilty, both as to the Southern and Agent Green and the imposing of a sentence of $30,000 fine on the Southern and the imposing of a nominal fine on the agent who pledged himself not to further violate the law. Green was given the choice of abandoning the sale of tickets and paying a nominal fine or standing out against the State court and receiving a sentence to prison and possibly the chain gang. In choosing to pay the fine he stated that he felt that he was guilty of no wrong, but had an aged and ill mother who could not understand the situation and lest further resistence might embitter her life he would not resist further. The understanding is that Green will be given some other position with the Southern. However the issues and ends involved in the imprisonment for the Southern exist at Asheville, where the cases will be carried right up to the United States Supreme Court and there will the affidavits setting out that the persecution of the Southern's agents is, as in Raleigh, forcing their agents to leave the service, thereby wrecking the business of the company. As to the fine of $30,000, the Southern has ten days in which to file notice of appeal.

Arguments.

The arguments today were by F. H. Busbee, Ex-Judge A. C. Avery, and General Counsel A. P. Thom, of the Southern for the defense and E. J. Justice and Ex-Governor Charles B. Aycock for the prosecution. Ex-Judge Avery for the defense said that forty years ago he fought battles for state rights. He was a states' rights young man. And through all these years of his professional and judicial service on the bench he had given his time to efforts to fix the lines between the state and the federal court and he was sure that the course being pursued by the defense was in no way an invasion of states' rights as compared with the rights of citizens, individual or corporate. Ex-Governor Aycock for the prosecution took the ground that the state is standing squarely on its rights. The railroad business is quasi public and the nation fixes interstate rates and the state regulates rates within the bounds of the state. This is what North Carolina has done. He charged that the ruling spirit of the defense in this case seemed to be contempt for the state court. Law is supreme in the state of North Carolina and every one, rich and poor, powerful and weak must in the end obey and pay the consequences of resistance, was Aycock's concluding remarks.

Thom's Address.

A. P. Thom of the Southern, made concluding argument for the defense contending that the state had failed

(Continued on Page Three.)

AGENT GREEN RESIGNS HIS POSITION

(Continued From Page 1.)

to prove Agent Green guilty of selling the ticket in question and that the Southern was not guilty of any violation because the coupon issued with the ticket was an additional value to compensate the addtional charge. He reviewed the whole course of the Southern in the litigation to prevent the enforcement of the state rate act arguing that no other course was open to the in the exercise of proper regard for the interests of the people who had their money invested, of the interests of the people who must have facilities for travel and transportation of freight. The whole matter was, he insisted, being adjudicated in another court of competent jurisdiction. He appealed for the exercise of reason and the return of "not guilty" verdict.

When Judge Long came to impose sentence on the Southern he expressed the highest regard for the Federal courts and regretted that much had been said in this connection about "Conflict" between this court and a branch of the Federal court. The jurisdiction for violation if the rate act were clearly, he said, in the state court, hence his insistence to retain it. He regretted that the Southern had seen fit to go into the federal court before putting the rate in operation and seeking relief if it were needed in the State court. Other roads were observing the rate. Only the Southern and one other (The Atlantic Coast Line) were holding out.

He was confident if they had applied it and found it burdensome state authorities would have granted the relief. Conduct like that of the Southern in this case bred anarchy. The law must be enforced. No peace could come to the state until all this spirit was suppressed. He saw no sign of any intention of the Southern to do other than continue to violate the law. So it must take the consequences. Let the Judgment be the Southern pay a fine of $30,000 and costs. And let execution issue.

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curs that a local train which is required to do way work, switching, loading and unloading freight at the stations along the line is delayed so that it consumes more than its regular time for making its run, and in that case overtime has to be paid; while in the
344 case of a through train there is no occasion for such delay, for they have practically no work to do at stations, as they pass over the division and there is seldom any overtime because they do it easily in their regular time; but that it often happens that what are called "local trains" are several hours over their regular time, thus causing the payment of overtime. Affiant states, further, that the ability of the railroad company to load what is called "through trains" from the beginning to the end of the run depends on the amount of business to be carried on them, and that the expense and cost of running the train over the road is but a trifle more when the engine is loaded to its full capacity than when it is running light, and that trifle consists in the additional amount of fuel that is used and in the additional number of cars that pass over the track, thereby causing a little more wear and tear, and that they are of such insignificance compared with earnings of the train that they do not really amount to anything. Affiant states, further, that the wages paid engineers, firemen, conductors, and brakemen on through trains are somewhat less than are paid to the same men who are on trains that do a local business. Affiant states, further, that the principal thing to be considered by a railroad operator in conducting his traffic operations is in respect to the loading of his trains, and that the constant effort of all transportation men and operating men is to have full trains; by that is meant to have every locomotive loaded to its capacity in going over the line, and to have as few light trains as possible. Affiant states that on the through trains this is more likely to be able to be done than on local trains, which are rarely or never loaded to capacity, while the through trains are as a rule, loaded to capacity.

Affiant states, further, that while he has spoken of through
345 and local business, that on a railroad where a very large proportion of the through business is interstate and a very small proportion is state, and where a large proportion of the local business is state and only a very small proportion of the through business is state, in his opinion in such a case as that the cost of state business over interstate business would not be materially changed from the opinion given above in this affidavit; that is to say, in such a case, in his opinion, it generally costs at least two or three times as much to do the state business as it does to do the interstate business in the proportion of the earnings on the state business to the earnings on the through business. And further affiant saith not.

(Signed) A. J. EARLING.

Subscribed to and sworn before me by A. J. Earling, this 11th day of June, A. D. 1907.

(Signed) W. D. MILLARD,
Notary Public.

(Here follows Exhibit G, marked p. 346.)

347 EXHIBIT "H."

Filed in this office July 20, 1907. W. S. Hyams, Clerk.

Governor Glenn Rings Clear as a Bell.

Has Employed Governor Aycock, Speaker Justice and S. G. Ryan, Esq., to Prosecute.

Will Uphold State Law.

The Governor of North Carolina Has Written a Vigorous Letter to the Superior Court Judges in which he Clearly shows That the Injunction against the State Law Cannot stop the North Carolina Courts from Enforcing the Provisions of the Rate Law and punishing Violators of the Law.

Being asked by a Reporter what he thought of Judge Long's action in having the Railroads indicted for violating the rate law, the Governor replied, "I heartily approve his course. Acting under his oath to execute the law the Judge could not have done less." The Governor further stated that at the request of the solicitor he had decided to employ counsel to aid in the prosecution.

Continuing the Governor said: "Since the decision of Judge Pritchard, upon the rate question, I have myself carefully examined the law and feel that a great wrong has been done the State and in order that every phase of the law may be tested, have felt it my duty to send the following letter to every judge of the Superior Court of the State.

My dear Judge: The General Assembly of North Carolina, on the second day of March, 1907, passed an act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina—said act fixing the maximum rate at 2¼ cents per mile and going into effect from and after July 1st, 1907.

Before said act went into effect the Southern Railway Company and the Stockholders of the Atlantic Coast Line obtained from the Circuit Court of the United States, an injunction against the Corporation Commissioners and the Attorney General prohibiting them from putting said act into effect until after the final hearing in that Court before the Circuit Judge could render such a decree thus interfering with an act passed by the legislature of a sovereign State he would have to find that said act was unconstitutional by
348 reason of its being confiscatory of the railroad's property.

The Judge in this case did not declare the act unconstitutional but ordered a reference before the Master to find out if the rates fixed were confiscatory the very thing in my opinion that should have been done before any decree should or could be legally made restraining officers of the State from executing its laws. On examining the law as passed by the General Assembly I find in Section 1 these words:

"No Railroad Company doing business as a common carrier of passengers in North Carolina except as herein provided shall charge demand or receive for transporting any passenger etc., a rate in excess of the 2¼ cents per mile.

"In Section 4 of the same act it is further provided that 'Any agent servant or employee of any railroad company violating this act shall be guilty of a misdemeanor and upon conviction fined or imprisoned or both in the discretion of the Court.'

"The Act of the General Assembly required no action on the part of the Corporation Commission or Attorney General to give it vitality, or to put it into effect. It was self acting and on July 1st, 1907, became a law and no decree of a Circuit Judge of the United States enjoining the Corporation Commissioners and Attorney General could or did prevent its becoming a law. The law is therefore now in effect and the agents, servants and employees of the railroads, who since the first day of July have charged demanded and received a greater rate than 2¼ cents per mile have violated the plain letter of the law and are liable to indictment as well as the higher officials of the roads who advised and directed their agents so to act.

The decree of the Circuit Court of the United States did not pretend to enjoin the enforcement of the criminal violation of the rate law and I do not believe any judge after reading the case of Fitts *vs.* McGhee 172 U. *E.* Reports, page 172 and cases there cited will ever attempt to make so high handed an order, but will leave the criminal law to be enforced by trial, appeal, etc. as provided by the Constitution, both of the State and United States.

349 "As Executive officer of the State it is made my duty to see that the Criminal laws of the State are enforced. To do less is to violate my oath. The law is being violated every day. I therefore ask you as a Judge of the Superior Court of the State to properly instruct the grand jury and to direct the solicitor of your district to send bills against the agents and employees of the railroads or its higher officials thus openly acting in defiance of law.

"I do not desire unnecessarily to *mulch* the railroads in costs and expenses by sending a great number of indictments against them, but only enough to test in the State Courts every phase of the law to the end that the guilty parties may be punished. If the railroads had given this law a fair test (and many are) to see if they could live under its provi-ions without their property being confiscated, and had found that they could not, the people of our State are just, and as I told some of their leading officers, I would have promptly called a special session of the legislature to have remedied, but it is a serious thing for a railroad, before ever attempting to see if it could live under the law's provisions to rush into the Federal Court to seek to enjoin the bill of a sovereign State, as expressed by the General Assembly. I desire no conflict between the Federal and State authorities, and there will be none, if the plain letter of the decisions of the Supreme Court of the United States is observed, but as Governor of the State, I fe*l*l a great wrong is

being done the State, and therefore desire that in our own tribunal this law shall be fairly and fully tested. This can be done by indicting the violators of said law, and letting them come into Court making their defense thus raising the constitutionality of this act and the right of a federal Judge to abrogate it before first declaring it unconstitutional.

"As chief Executive of the State, I stand ready to aid you in every way possible in enforcing the law.

R. B. GLEN, *Governor.*

The Governor said he had no criticism to make, he was simply trying to enforce the law that he felt was being violated, and to this end had employed counsel to assist the solicitors in case they needed it. The Governor said he deeply regretted the condition things were in, but the action of the railroads left him no other alternative, but to do as he was doing, and that he took this action after carefully examining the law and having the approval of the Council of State.

350 *Statement of Case.*

Filed in this office July 22, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, Sitting at Asheville.

In re Application of Jas. H. Wood for Writ of *Habeas Corpus.*

The petitioner, Jas. H. Wood, having heretofore filed a petition for a writ of *habeas corpus*, and the said writ having upon said petition been issued directed to Thomas F. Hunter, Sheriff of Buncombe County, North Carolina, now on July 19, 1907, the said Thomas F. Hunter produced the body of the said Jas. H. Wood into Court and made return to the said writ, and thereupon this cause was heard and continued from day to day until this day, July 22, 1907.

The said cause was heard upon the said application and the exhibits filed therewith, namely:

Exhibit A, which is the mittimus,

Exhibit B, which is the warrant,

Exhibit C, which is a copy of the bill in equity filed by the Southern Railway Company against Franklin McNeill and others in the Circuit Court of the United States for the Eastern District of North Carolina,

Exhibit D, which is a copy of an order entered in said cause on June 29, 1907; and

Exhibit E, which is a copy of the ancillary bill filed by the same complainant against the same defendants in the Circuit Court of the United States for the Western District of North Carolina;

All of which papers were read on the hearing.

351 There was also read upon the hearing a full transcript of the pleadings and proceedings in the said cause in the Circuit Court of the United States for the Eastern District of North

Carolina, and in the said cause in the Circuit Court of the United States for the Western District of North Carolina. Said papers and exhibits above mentioned, and said records, are now identified as a part of this record as fully as if now copied herein, also the coupon given to the prosecuting witness when the alleged sale was made, and the answer filed by def't on the hearing in the police Court.

There was also heard certain oral evidence, a transcript of which is attached hereto marked Exhibit F, which is filed of record and to be taken as a part hereof as fully as if inserted herein, and certain articles in certain papers filed as evidence, said Articles are marked Exhibits G. & H.

And the Court having heard argument of counsel, and being advised now on this July 22, 1907, filed herein its findings of law and fact which are as follows:

352 *Opinion. Pritchard, Judge.*

UNITED STATES OF AMERICA, *Western District of North Carolina:*

In the Circuit Court.

In re JAMES H. WOOD, Petitioner, on Writ of *Habeas Corpus.*

This is an application of the petitioner, Jas. H. Wood, to be discharged on a writ of *habeas corpus* from the custody of the Sheriff of Buncombe County.

The petitioner was indicted on a charge of having violated the provisions of section four of an Act passed at the session of the legislature of North Carolina of 1907, prescribing the maximum
353 charges railroad companies may make for transporting passengers in North Carolina, tried and convicted and sentenced to a term of thirty days' imprisonment to be worked upon the public roads of Buncombe County.

Some time since suits were instituted in the Circuit Court of the United States for the Eastern District of North Carolina by several railroad companies against the Corporation Commissioners of North Carolina, the Attorney General and the Assistant Attorney General of that State, for the purpose of obtaining protection of the Fourteenth Amendment to the Constitution of the United States against an Act of the legislature of North Carolina establishing maximum rates which such companies claimed to be confiscatory, and on a *prima facie* case, a motion was made for interlocutory injunctions. Accordingly, on the 29th of June, injunctions *pendente lite* were issued enjoining the defendants and all other persons from putting the rates into effect during the inquiry as to the constitutionality of the same, and from instituting prosecutions or attempting to impose penalties upon the companies, or their employees, for a failure to put into effect the statutory rates which are being contested. The court amply preserved the rights of the traveling public by requiring a coupon to be given to each purchaser evidencing the amount to be re-

funded to him in the event the rates should be upheld, and to secure the same ample bond and security were given. This was in accordance with the policy of the law of North Carolina where a rate made by the Commission is attacked. Thereupon the matter was referred to a master to ascertain the facts and report his conclusions, and, to avoid delay, he was required to make his report by the 25th of September, and the hearing was given for the first Monday in October, so as to give the parties opportunity to have the questions involved finally determined by the Supreme Court at the earliest possible moment.

There was nothing unusual in the proceedings. Similar suits have been instituted in the State of Alabama, where Judge Jones issued an injunction, and also in the State of Georgia, where Judge Newman pursued the same course.

Notwithstanding the United States Circuit Court had thus taken jurisdiction of the whole matter and was proceeding in an orderly way with its consideration, the evidence shows that the Governor of North Carolina has issued an address to the judges of the Superior Courts of the State, questioning the authority of the court to make the order referred to, and asking them to see that indictments against the agents and employees of the railroads and its officials be sent before the grand jury in order that the State may undertake the prosecutions which are enjoined in my order, and stating that, as chief executive of the state, he stands ready to aid them in enforce-
354 ing the law. In accordance with this policy, a number of indictments have been found and prosecutions begun in defiance of the order of injunction issued by the Court. If these prosecutions are permitted and continued, the result will be to nullify the injunction which was granted by the Court, and to practically defeat its jurisdiction. Not only are the rights of litigants involved, but the dignity and authority of the Circuit Court of the United States as well. These prosecutions and arrests taking place in widely separated portions of the State, present serious difficulties in the matter, and this court is confronted with open and avowed opposition by the powers of the State. Obstacles are being thrown in the way of inquiry by this court on writs of *habeas corpus* into the legality of arrests, and this seems to be the deliberate policy of those representing the State. The Court does not wish to be understood as imputing improper motives to the Governor or other State officials. The penalties prescribed by the State statute for charging more than the statutory rates are so enormous, that if permitted to be enforced they would practically bankrupt the railroad in an exceedingly brief time and before a final hearing could be had in the cause, and thus place the complainant in a position where it would be powerless to assert a right which is guaranteed to it by the Constitution of the United States.

If the criminal prosecutions against the agents, conductors, and employees are permitted to continue, the managers of the railroads cannot successfully operate their trains, carry the mails, or continue their usefulness as common carriers doing an interstate business.

The Constitution of North Carolina contains ample provision for the protection and preservation of the liberty of the citizen.

Article 1, Sec. 18, contains the following:

"Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed."

Section 21 of the same Article also provides:

"The privileges of the writ of *habeas corpus* shall not be suspended."

Section 1821 of the Revisal of North Carolina is as follows:

"Every person imprisoned or restrained of his liberty within this State, for any criminal or supposed criminal matter or on any pretense whatsoever, except in cases specified in the succeeding section, may prosecute a writ of *habeas corpus* according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and if illegal, to be delivered therefrom."

Section 1828 of the same chapter is the only law of which
355 the Court — any knowledge that imposes upon a judge a penalty for a failure to perform a judicial act. The section in question reads as follows:

"If any judge authorized by this chapter to grant writs of *habeas corpus* shall refuse to grant such writ when legally applied for, every such judge shall forfeit to the party aggrieved two thousand and five hundred dollars."

Thus it will be seen that the State Constitution of North Carolina as well as the statutory law, affords ample protection to every person who is deprived of his liberty without due process of law, and such being the case, it is remarkable that anyone representing the State should be opposed to the granting of the writ of *habeas corpus*.

Likewise, the Constitution of the United States and the Revised Statutes afford every citizen of the Union when imprisoned contrary to law, protection to the fullest extent by the writ of *habeas corpus*.

Article 1, Sec. 9, Cl. 2, of the Constitution of the United States is as follows:

"The privileges of the writ of *habeas corpus* shall not be suspended unless in cases of rebellion or invasion, the public safety may require it."

Section 751 of the Revised Statutes of the United States contains the following provisions:

"The Supreme Court and the Circuit and District Courts shall have power to issue writs of *habeas corpus*."

"The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty." (Revised Statutes, Sec. 752.)

"The court, or justice, or judge to whom such application is made shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained." (Revised Statutes, Sec. 755.)

Notwithstanding the plain provisions and enactments contained

in the Constitution and Revised Statutes of the United States as well as the State Constitution and the statutes of the State, it is seriously contended that the agents of the complainant in this instance, when indicted for the violation of the statute (the enforcement of which has been restrained by this court), are not entitled to a remedy which is afforded to every other citizen of the State.

If this policy is to prevail in North Carolina, persons who
356 invest their money in enterprises like that of the complainant will be deprived of the means of protecting their property rights and denied the benefits of the writ of *habeas corpus* which is intended for the preservation of the liberty of every citizen.

It will be a sad day for the people of North Carolina when its citizens are prohibited by the acts of the legislature from asserting any rights guaranteed to them by the Constitution of the United States. Suits of this character have been brought in different states of the Union, and in every instance the Federal courts have proceeded to determine the questions involved without interference, hindrance or delay by the legislative or judicial authorities of such states.

The equal protection of the law is guaranteed to every citizen of the United States, and I shall employ all means within the power of the court to secure to persons who invoke the jurisdiction of this court such rights to the fullest extent of the law.

If the law is construed in a spirit of fairness and impartiality there can be no conflict of jurisdiction between the state courts and the Courts of the United States.

Much has been said in regard to the power of a court of equity to enjoin the prosecution of a criminal case. In the case of Dobbins *vs.* Los Angeles, 195 U. S. 241, Mr. Justice Day, who delivered the opinion of the court, in discussing this phase of the question, said:

"It is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings, under a void law, or ordinance, may be reached and controlled by a decree of a court of equity. Davis and Foreman Mfg. Co. *vs.* Los Angeles, 189 U. S. 207-18, and cases there cited."

In this instance the Federal court has not been the aggressor, but has simply adopted the regular practice and procedure which has been approved by the Supreme Court of the United States in cases of a like nature, and while the court is not inclined to do anything that will produce an unseemly conflict, nevertheless, it is incumbent upon it to protect the rights of the parties to this controversy as well as maintain the dignity and authority of this court, and this cannot be accomplished without preserving to the fullest extent the jurisdiction of the court in determining the question which has been submitted to it for consideration.

If, in pursuing the usual and well defined practice and procedure in such cases with the sole view of maintaining the jurisdiction of this court at any stage of the proceeding, conflict must come, and I trust that it may not, I shall not evade the responsibility which is imposed upon me as the presiding officer of this court.

Much has been said about the sovereignty of the Statte. That

question does not arise in this controversy. This court
357 having assumed jurisdiction of the subject matter involved in the original suit, wherein the railroad companies are complainants and the railroad commissioners and others are defendants, the real question is, as to whether this court shall be denied full and complete jurisdiction of the subject matter at issue in that suit.

If the contention of the counsel representing the State be true, then, this court can be deprived of its jurisdiction by the multiplication of criminal prosecutions in the State courts against the complainant, its agents and employees to such an extent as to finally place it in a position where it will be deprived of a larger amount than that which is involved in the original controversy, and thus, by indirection the complainant will be denied a right which is guaranteed to it by the Constitution of the United States. This proposition is inconsistent with the well established rules of judicial procedure and does not commend itself to this or any court sitting as a court of equity. It excludes the idea of comity between the courts of concurrent jurisdiction.

Suppose complainant had instituted its suit in the State court instead of applying to this court, and that court had granted an injunction in pursuance of the laws of the State, could it be seriously contended that the State court, after having taken jurisdiction of the question involved in the civil action, thus instituted, would permit the complainant to be subjected to criminal prosecutions and suits for the recovery of the enormous penalties enumerated in the statute of the State, during the pendency of the action, and before there could be an ascertainment as to the rights of the parties to the original suit? The State Court, under such circumstances, would undoubtedly preserve the rights of the parties until the final hearing and any other course would be without precedent in the judicial history of the State. Notwithstanding this, we are confronted with an attempt on the part of those representing the State to do that, which, if successful, would render this court powerless to grant the same relief that would be granted as a matter of course in another court of concurrent jurisdiction.

The law provides that in all cases where the Federal courts have concurrent jurisdiction with the State courts, that such courts shall have power and authority to adjudicate any question that may come before such tribunals and to protect the rights of litigants to the same extent as that of the State courts.

The suits, out of which this controversy arose, were instituted in the same manner as other suits are instituted, and, involving as they do, the validity of a statute of North Carolina, it necessarily follows that all matters connected with the enforcement of such statute, during the pendency of that suit, are under the control and jurisdiction of the court wherein the questions involved are being litigated.
358 The court in the original suit having assumed jurisdiction of the questions at issue in that controversy and having entered a decree wherein, among other things, the complainant and its agents, were directed to employ certain means and do certain things in respect to the sale of tickets during the pendency of that

suit, the court thereby assumed control of, and dominion over, the management of the business of the complainant in so far as intrastate transportation is concerned in the same manner as if the court had appointed a receiver of the property of complainant.

As a general rule, the Circuit Courts of the United States will not issue the writ of *habeas corpus* in cases where persons are indicted and imprisoned in pursuance of a statute of a State, however it must be remembered, that this is not an attempt on the part of the State to enforce a law which has for its object the preservation of the peace, protection of the morals, or the general welfare of the public, and it cannot be insisted that these prosecutions are necessary to promote the welfare of the public in view of the fact that this court has amply protected the rights of those who may purchase tickets by requiring the complainant to give bond amply sufficient to secure the payment of any damages that may be sustained; but, on the other hand, is a penal statute, enacted with the sole view of enforcing obedience to the first section of the act which undertakes to fix maximum passenger rates. Therefore, inasmuch as the validity of the act which prescribes passenger rates is being contested, and the court has by injunction restrained the enforcement of the same, there is every reason why this court should exercise its discretion in granting writ of *habeas corpus*, when it is apparent that prosecutions of the complainant and its agents are being instituted solely for the purpose of deterring the complainant from prosecuting its original suit.

In view of this situation, the court is called upon to determine the question whether the petitioner is entitled to be discharged, inasmuch as it appears to the court that the act, on account of which he was indicted, was committed in pursuance of an order and decree of this court.

Section 753 of the Revised Statutes of the United States is as follows:

"The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, in its custody for an act
359 done or omitted under any legal right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

The provisions of the foregoing section are so plain that there can be no doubt as to the true intent and meaning of the same. It is provided in express terms that the writ of *habeas corpus* shall extend to one who is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof.

In the case of State *vs.* Boone, 132 N. C. 1108, Chief Justice Clark,

who delivered the opinion of the court, in discussing the Neagle case, among other things, said:

"No such doctrine is found in Neagle's case (Neagle's case 135 U. S. 1), for it only holds that what the Federal Government enjoins as a duty, the State cannot punish as a crime."

This court by proper order, having directed that the complainant should provide a ticket with a coupon attached thereto representing the difference between the present rate and the proposed rate, it thereby became the duty of the company and its agents to strictly comply with the requirements of such order, and any failure on their part to observe the same would render them liable to an attachment for contempt, and under such circumstances, the duty being enjoined by this court, the performance of the same by the complainant and its agents would not render them liable to punishment under the statute of the State. Any attempt to punish the company or its agents for the observance of the order and decree of this court, would be in utter disregard of the comity which should exist between the State and Federal courts, as well as an absolute nullity.

If the State courts possess the power to indict persons acting under the directions of the Federal court for the performance of a duty enjoined upon them in a suit which may be brought in such court, then the power of the Circuit Courts of the United States would be completely paralyzed and such courts would be rendered unable to proceed to the determination of any question involving the validity of the statute of a State legislature.

While the court is of the opinion that the petitioner is entitled to be discharged, for the reasons hereinbefore stated, nevertheless, there is another phase of this question which should be considered, in order that there may be a proper determination of the matter in controversy, and in the consideration of which it is encumbent upon
360 the court to pass upon the validity of Section four of the act in question, which reads as follows:

"That any railroad company violating any provision of this act shall be liable to a penalty of five hundred dollars for each violation, payable to the person aggrieved by such violation, and recoverable in an action to be instituted in the name of said person in any court of this State having competent jurisdiction thereof. And any agent, servant, or employee of any railroad company violating this act shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court."

The foregoing section, among other things, provides that the company or its agents shall pay a penalty of five hundred dollars for each failure to comply with the requirements of the act.

It has been held that no State can constitutionally close the doors of the courts to a judicial inquiry into the constitutionality of the rates it fixes.

In the case of Railroad Company *vs.* Minn. 134 U. S. 456, it was held by the Supreme Court of Minnesota that the act in fixing rates was conclusive and there could be no inquiry into such rates by judicial tribunals. Accepting this construction of the Minnesota act by the Supreme Court of that State, the Supreme Court of the United

States declared the act unconstitutional, because it denies the railroad company a judicial investigation into the validity of the rates. If this cannot be accomplished directly, it cannot be done indirectly.

It is well settled that what cannot be done by express enactment cannot be done by device or indirection. Therefore, any system of penalties which is intended to have the effect and which is so framed as to have the effect of closing the doors of the courts to a judicial inquiry as to rates, is in consequence of that fact unconstitutional and void. Section four of the act in question clearly attempts to do this. It imposes upon the company as a penalty for an unsuccessful attempt to appeal to the court, no matter how *bona fide* this bill is made, such enormous fines and penalties in favor of individuals as to burden the challenger of the act in the courts so as to make it, if the penalties were valid, practically impossible for such an appeal to be made.

In the case of Cotting *vs.* Kansas Stock Yards Co., 183 U. S. 100, Mr. Justice Brewer, who delivered the opinion of the court, in discussing this phase of the question, said:

"It may be said that this is a penal statute, and therefore it is to be construed in favor of the delinquent, and that we have a right to expect that the State courts will construe the penalty as not attaching to the charge for each head of stock, but only to that upon the separate bunches shipped by different individuals. But is the lan-
361 guage so clear that there is no doubt as to the construction? Is there not enough in it to justify a construction which may be accepted by the trial courts and approved by the Supreme Court of the State, and the construction of a State statute by the Supreme Court of the State is in a case like this conclusive upon us. Must the party upon whom such a liability is threatened take the chances of the construction of a doubtful statute? If the one construction is placed upon it, then obviously, even accepting the largest estimate of value placed by any witness upon the property of the company, a single day's violation of the statute would exhaust such entire value in satisfaction of the penalties incurred. In this feature of the case we are brought face to face with a question which legislation of other states is presenting. Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defence subject to the condition that, upon failure to make good that claim or defence the penalty for such failure either appropriates all of his property, or subjects him to extravagant and unreasonable loss? Let us make some illustrations to suggest the scope of this thought.

"Suppose a law were passed that if any laboring man should bring or defend an action and fail in his claim or defence, either in whole or in part, he should in the one instance forfeit to the defendant half of the amount of his claim, and in the other be punished by a fine equal to half of the recovery against him, and that such law by its terms applied only to laboring men, would there be the slightest hesitation in holding that the laborer was denied the equal protection of the laws? The mere fact that the courts are open to hear his claim or defence is not sufficient, if upon him, and upon him alone, there is visited a substantial penalty for a failure

to make good his entire claim or defence. Take another illustration: Suppose a statute that every corporation failing to establish its entire claim, or make good its entire defence, should as a penalty therefor forfeit its corporate franchise, and that no penalty of any kind except the matter of costs was attached to like failures of other litigants, could it be said that the corporations received the equal protection of the laws? Take still another illustration: Suppose a law which, while opening the doors of the courts to all litigants, provided that a failure of any plaintiff or defendant to make good his entire claim or entire defence should subject him to a forfeiture of all his property or to some other great penalty; then, even, if, as all litigants were treated alike, it could be said that there was equal protection of the laws, would not such burden upon all be adjudged a denial of due process of law? Of course, these were extreme illustrations, and they serve only to illustrate the proposition that a statute (although in terms opening the doors of the courts to a particular litigant), which places upon him as a penalty for a failure to make good his claim or defence, a burden so great as to practically intimidate him from asserting that which he believes to be his rights is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws. It may be said that these illustrations are not pertinent because they are of civil actions, whereas this statute makes certain conduct by the stock yards company a criminal offence, and simply imposes punishment for such offense; that it is within the competency of the legislature to prescribe penalties for all offences, either those
362 existing at common law or those created by statute; and further, that although that the penalties herein imposed may be large, yet obedience to a statute like this can only be secured by large penalties; for otherwise the company, being wealthy and powerful, might defiantly disregard its mandates, trusting to the manifold chances of litigation to prevent any serious loss from disobedience. A penalty of a dollar on a large corporation, whose assets amount to millions, would not be very deterrent from disobedience. It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations; and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts, that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

The evidence shows that one case under this provision of the act has already been tried in the Superior Court of Wake county against the complainant as a corporation and one of its agents at that place. In that case the court imposed a fine of thirty thousand dollars against the company, and notified the agent that if he would stop selling tickets at a price that was authorized by the decree of

this court the judge would impose a nominal punishment, but if he did not, the court would not say what it would do until it had received an answer.

In making this reference the Court does not wish to be understood as criticising the State court, for there is no one in the State for whom the Court entertains a higher regard than Judge Long.

It is also shown by the uncontradicted evidence in this case that at least five thousand tickets are sold daily by complainant at its various offices in the State, in its intra-state business, thereby making it possible for it to be sued five thousand times in one day for penalties amounting to five hundred dollars in each instance on account of its failure to comply with the statute fixing passenger rates.

Thus it will be seen that by an enforcement of the statute judgments can be obtained against the complainant for the sum of two million and five hundred thousand dollars for each day. The aggregate penalties for which judgment could be obtained for one day would amount to a sum more than eight times as much as the sum involved in the original suit would be for one year.

This system of legislation is also condemned by Judge Lacombe, in the case of Consolidated Gas Co. *vs.* Mayer 146 Fed. Rep. 150, and the conclusion is irresistible, from what this distinguished jurist has to say that such a system of penalties is unconstitutional
363 and void. This not only applies to penalties in favor of individuals against the company, but also as to penalties against agents of the company which would render it utterly impossible for the company to carry on its business while having an orderly inquiry made by the courts as to its constitutional rights.

The Court is therefore of the opinion that the section of the act attempting to impose penalties and fines is unconstitutional and void upon its face *of the act*. For the reasons hereinafter stated, the petitioner will be discharged.

An order discharging the petitioners from the custody of the officers of the State court will be entered and a copy of the same will be certified to the Police Justice of the city of Asheville and the Sheriff of Buncombe county.

July 22, 1907.

J. C. PRITCHARD,
U. S. Circuit Judge.

364 *Order.*

Filed in this Office July 22, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, Sitting at Asheville.

In re Application of Jas. H. Wood for Writ of *Habeas Corpus.*

On this twenty-second day of July, 1907, came the parties in person and by their counsel, and this cause coming on to be heard upon the papers and proof as set forth in the order entered this day, and the Court having found the law and facts as set forth in an order

entered this day, the court finds that said petitioner is unlawfully restrained of his liberty, and it is therefore considered and ordered by the court that said Jas. H. Wood be discharged from the custody of Thomas F. Hunter, Sheriff of Buncombe County, North Carolina, as aforesaid, and that he go hence without day.

It is further ordered that the United States Marshal serve a copy of this order upon the said Sheriff of Buncombe County, North Carolina, and upon G. S. Reynolds, Police Justice of the City of Asheville, County of Buncombe, State of North Carolina.

J. C. PRITCHARD,
United States Circuit Judge.

Endorsed as follows: *In re* Jas. H. Wood. Original duplicate. Rec'd Jul- 22, '07. Executed Jul- 22, '07 as to G. S. Reynolds, July 25, '07. as to T. F. Hunter, Sheriff. J. M. Millikan, U. S. M. By R. S. Ramsey, D. M.
Fees $4.00.

365 *Petition for Appeal.*

U. S. Circuit Court. Filed Sept. 09, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit, at Asheville.

In re Application of JAMES H. WOOD for a Writ of *Habeas Corpus.*

Thomas F. Hunter, Sheriff of Buncombe County State of North Carolina, by his Attorneys, Merrimon & Merrimon, feeling himself *agreed* by the order and judgment entered on the 22 day of July, 1907 in the above entitled proceeding, does hereby appeal from said order to the Supreme Court of the United States and prays that his appeal may be allowed and that a transcript of the record of proceedings and papers upon which said order is made duly authenticated may be sent to the Supreme Court of the United States.

MERRIMON & MERRIMON,
Attorneys for Thomas F. Hunter,
Sheriff of Buncombe County, Respondent.

366 *Assignment of Errors.*

U. S. Circuit Court. Filed Sept. 09, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit, at Asheville.

In re Application of JAMES H. WOOD for Writ of *Habeas Corpus.*

Assignment of Errors on Appeal.

Thomas F. Hunter, Sheriff of Buncombe County, respondent, in connection with his petition for appeal, says that the decision in said cause is erroneous and against the just rights of the said respondent, and that in the record and proceedings there is manifest error in this to-wit:

1. The Court erred in assuming jurisdiction of the matter at issue.

2. The Court erred in admitting and considering evidence over the objections and exceptions of the respondent which was incompetent and not pertinent to the matter under investigation.

3. The Court erred in holding that it had enjoined the Southern Railway Company from putting into effect the rates for passengers required by an act of the General Assembly of North Carolina, Chapter 216, Public Laws 1907.

4. The Court erred in holding the fourth section of the said Act unconstitutional and void on its face and that, therefore, the arrest and conviction of the petitioner, Jas. H. Wood, for the violation thereof, is illegal and void.

5. For the Court erred in holding that the decree rendered by the Court in the cause of the Southern Railway against Franklin McNeill and others was fully operative and binding upon all persons, including State officials invested with the enforcement of the criminal laws of the State, and that said decree operated to prevent the
367 institution of any prosecutions for the violation of said Act of the General Assembly, and the prosecution of the petitioner, Jas. H. Wood, therefor.

6. The Court erred in holding that the Court had assumed control and dominion over the property of the Railway Company so far as intra-state business is concerned in the same manner as if the Court had appointed a receiver.

7. The Court erred in holding that the Act on account of which the petitioner, Wood was indicted and convicted, was committed in pursuance of an order or decree of the Circuit Court of the United States for the Western District of North Carolina.

8. The Court erred in refusing to discharge the writ and to remand the *petition of Wood* to the custody of the respondent.

9. The Court erred in rendering the decree discharging the petitioner Wood from the custody of the respondent as Sheriff of Buncombe County, North Carolina.

10. For other errors appearing upon the record. Wherefore the said Thomas F. Hunter, respondent, prays that said order or decree of said Court be reversed; that an order be entered remanding the

said James H. Wood to the cust dy of the respondent as Sheriff of Buncombe County North Carolina, to the end that said Hunter, as such Sheriff may perform the order and decree of the police Court of the City of Asheville, and for such other and further relief as may be proper in the premises.

MERRIMON & MERRIMON,
Attorneys for Respondent.

368 Know all Men by these Presents, That we, Thomas F. Hunter, Sheriff, Buncombe County, North Carolina, as principal, and The United States Fidelity & Guaranty Company of Baltimore, Maryland as sureties, are held and firmly bound unto James H. Wood in the full and just sum of One Thousand dollars, to be paid to the said *Thomas F. Hunter, Sheriff,* — certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of September, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a Term of the Circuit Court of the United States for the Western District of North Carolina in a suit depending in said Court, in the matter of the application of James H. Wood for a discharge from the custody of Thomas F. Hunter, Sheriff of Buncombe County, North Carolina under a Writ of *Habeas Corpus* a decree and order was rendered granting the writ and discharging the said Wood from custody and the said Thomas F. Hunter, Sheriff of Buncombe — North Carolina having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said James H. Wood petitioner in the said Writ citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof.

Now, the condition of the above obligation is such, That if the said Thomas F. Hunter Sheriff of Buncombe County, North Carolina shall prosecute this appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

T. F. HUNTER, [SEAL.]
Sheriff, Buncombe County.
THE UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]
By ALF S. BARNARD, *Ag't & Att'y.*
THE UNITED STATES FIDELITY & GUARANTY CO.,
By P. R. MOALE, *Agent & Att'y in Fact.*

Sealed and delivered in presence of—
J. G. MERRIMON,
As to T. F. Hunter, Sheriff.

Approved by—
J. C. PRITCHARD,
U. S. Circuit Judge.

369 *Judge's Certificate.*

U. S. Circuit Court. Filed Sept. 09, 1907. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit, at Asheville.

In re Application of JAMES H. WOOD for Writ of *Habeas Corpus.*

In this cause I hereby certify that the order discharging James H. Wood from the custody of Thos. F. Hunter, Sheriff of the County of Buncombe is based upon the grounds set forth in the opinion by me in said cause, which opinion is made a part of the record and will be certified and sent up as a part of the proceedings, together with this certificate.

I further certify that the jurisdiction of this Court is in issue as is shown by the record in the cause.

This 9th day of Sept. 1907.

J. C. PRITCHARD,
U. S. Circuit Judge.

370 U. S. Circuit Court. Filed Sep. 09, 1907. W. S. Hyams, Clerk.

UNITED STATES OF AMERICA, *ss:*

To James H. Wood, Greeting:

Whereas Thomas F. Hunter has lately appealed from the decree lately rendered in the Circuit Court of the United States, for the Western District of North Carolina, made in favor of you, the said James H. Wood, discharging you from the custody of the said Thomas F. Hunter, Sheriff of Buncombe County and has filed the security required by law; you are, therefore, hereby cited to appear before the said Supreme Court at the City of Washington on the 8 day of October, 1907 next to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City of Asheville, in the Fourth Circuit, this the 9th day of September, in the year of our Lord one thousand nine hundred and seven.

J. C. PRITCHARD,
Judge of Circuit Court of the United States for the Fourth Circuit.

Service of the foregoing citation accepted this Sept. 9th, 1907.

MOORE & ROLLINS,
Of Counsel and Attorneys for Petitioner, Jas. H. Wood.

371 *Clerk's Certificate.*

THE UNITED STATES OF AMERICA,
Western District of North Carolina:

In the Circuit Court, at Asheville.

I, W. S. Hyams, Clerk of the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit at Asheville do certify that the foregoing is a full and true Transcript in the cause of the Application of James H. Wood for Writ of *Habeas Corpus*, as fully as the same remains on file and of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said Court at Office in the City of Asheville on this the 19th, day of September, A. D. 1907.

[Seal United States Circuit Court, Western Dist. of N. C., at Asheville.]

W. S. HYAMS,
Clerk U. S. Circuit Court.

372 In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit, at Asheville.

In the Matter of the Application of JAMES H. WOOD for *Habeas Corpus.*

I, W. S. Hyams, Clerk of the Circuit Court, do hereby certify that the Ancillary Bill in the case of Southern Railway Company against Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, Robert D. Gilmer, and Hayden Clement, J. A. Spence, Elijah Moffitt, J. R. McKenzie, E. B. Hatch, W. C. Hurley, F. A. Henley, W. M. Hooker, Chas. A. Armstrong, L. F. Nance, Spencer Howell, Robert Howell, Coon Howell, Henry Smitherman, Jesse Eldridge, Claude Howell, Wallace Armstrong, Guy Smitherman, the last four being infants under the age of twenty-one years, and J. M. Way and B. C. Beckwith, defendants, which appears in the record of the above mentioned cause, as certified to the Supreme Court of the United States from this Court, was filed in the office of this Clerk on July 16, 1907; and on the same day there was filed with the said bill the following order:

"In the Circuit Court of the United States for the Western District of North Carolina.

SOUTHERN RAILWAY COMPANY, Complainant,
v.
FRANKLIN MCNEILL ET AL., Defendants.

373 "Upon reading the verified ancillary bill in this cause, and upon its being made to appear to the court that there is danger of irreparable injury to the complainant from delay unless the acts sought to be enjoined herein are restrained until a hearing upon the motion for an injunction in this cause, it is now ordered:

"1. That the defendants, Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield, constituting the Corporation Commission of North Carolina, and each of them individually and jointly as constituting the said Corporation Commission of North Carolina, and each and all of their successors in office, and their and each of their agents and employees be, and they hereby are, restrained and enjoined from preparing or publishing the tariff of rates, charges and tolls mentioned in the fifth section of the act in the bill in this cause mentioned, entitled, 'An Act to prevent unjust discrimination in freight rates and to fix the maximum charges therefor,' ratified March 9, 1907, and hereinafter referred to as 'Act in respect to freight rates,' and from classifying the railroads operating in North Carolina in accordance with,' and from publishing the rates fixed by, an act of the General Assembly of North Carolina, in the bill in this cause mentioned, entitled 'An Act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina,' ratified March 2, 1907, and hereinafter referred to as 'Act in respect to passenger rates,' and from taking any steps under or in pursuance of the said Act in respect to freight rates, or the said act in respect to passenger rates.

"2. That the defendants Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield, constituting the Corporation Commission of North Carolina, and each of them individually and jointly as constituting the said Corporation Commission of North Carolina, and each and all of their successors in office, their and each of their attorneys, agents and employees, and the defendants, Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, their and each of their successors in office, their and each of their attorneys, agents and employees, and the defendants, J. A. Spence, Elijah Moffitt, J. R. McKenzie, E. B. Hatch, W. C. Hurley, F. A. Henley, W. M. Hooker, Charles A. Armstrong, L. F. Nance, Spencer Howell, Robert Howell, Coon Howell, Henry Smitherman, Jesse Eldridge, Claude Howell, Wallace Armstrong, Guy Smitherman, J. M. Way and B. C. Beckweth, and each of them, their and each of their attorneys, agents and employees, are, and each of them is, hereby restrained and enjoined from instituting, prosecuting, or further prosecuting, and from permitting or authorizing to be instituted, prosecuted, or further prose-

cuted, any suit or prosecution, and from proceeding, either civilly or criminally, against the complainant, or against any officer, agent or employee of the complainant, for the recovery or imposition of any penalty or punishment under or by virtue of said Act in respect to freight rates or said Act in respect to passenger rates, or under or by virtue of any law of North Carolina, because of, or growing out of, the failure of said complainant or any of its officers, agents or employees, to put into effect or to observe on any of the lines of the complainant in North Carolina the freight rates or the pas-
374 senger rates prescribed in said acts, or in either of them, or to comply with any of the provisions of any of said acts, or for the recovery of any damages or overcharges because of, or growing out of, any such failure, or for the enforcement of any claim, alleged right, or cause of action, growing out of, or connected with, any such failure.

"3. That all other individuals, persons and corporations are, and each of them is, hereby restrained and enjoined from instituting, prosecuting, or further prosecuting, and from permitting or authorizing to be instituted, prosecuted or further prosecuted any suit or prosecution or other proceeding, either civil or criminal, against said complainant, or against any officer, agent or employee of said complainant, for the recovery of any damages or overcharges, or for the recovery or imposition of any penalty, or punishment, under or by virtue of said Act in respect to freight rates, or said Act in respect to passenger rates, or under or by virtue of any law of North Carolina, because of, or growing out of, the failure of said complainant or any of its officers, agents or employees, to put into effect or to observe on any of the lines of the complainant in North Carolina the freight rates or the passenger rates prescribed in said acts, or to comply with any of the provisions of either of said acts.

"4. That the defendants, and each of them, show cause before this court in the United States court room at Asheville, North Carolina, at ten o'clock, A. M., on twelfth (12) day of August, 1907, why an injunction *pendente lite* as prayed in the bill should not be issued, and that a copy of this order be served as soon as practicable upon each of the defendants.

"5. That this restraining order shall be in force and effect from the date hereof and until the determination of the complainant's motion for an interlocutory injunction herein.

J. C. PRITCHARD,
United States Circuit Judge.

This July 16th, 1907."

and on that day copies of said ancillary bill and order were issued from this office, and on July 20, 1907, the said ancillary bill, and the restraining order issued thereon, was delivered to J. M. Millikan, United States Marshal for the Western District of North Carolina, and by the said J. M. Millikan served on J. A. Spence and
375 others, as shown by his return, which is as follows:

"Received July 20th 1907, Executed July 20th, 1907, by leaving a copy of within each J. A. Spence, Elijah Moffitt, E. B. Hatch, F. A. Henley, W. M. Hooker, and J. M. Way and by leaving copy with each on July 22 J. R. McKinzie, W. C. Hurley, Chas. A. Armstrong, L. F. Nance, Spencer Howell, Robert Howell, Guy Smitherman, Coon Howell, Henry Smitherman, Jesse Eldridge, Claud Howell and Wallace Armstrong.

J. M. MILLIKAN,
U. S. Marshal,
Per J. M. ALLEN,
Deputy Marshal.

Fees $36.00.

"Received July 29, 1907,
"Executed July 29, by delivering copy of within to Hayden Clement.

J. M. MILLIKAN,
U. S. Marshal,
By R. S. RAMSEY, *D. M.*

Fees 2.00;"

and on July 29, 1907, a copy of said bill and order directed to Hayden Clement was delivered to the said J. M. Millikan, United States Marshal, and was on said date, to-wit, July 29, 1907, served by delivering a copy of the same to Hayden Clement.

In witness whereof, I have hereunto set my hand and the seal of my said office in the City of Asheville, this the 26th day of November, 1907.

[Seal United States Circuit Court, Western Dist. of N. C., at Asheville.]

W. S. HYAMS,
Clerk U. S. Circuit Court.

376 In the Supreme Court of the United States.

No. 474, October Term, 1907.

THOMAS F. HUNTER, Sheriff, Etc., Appellant,
v.
JAMES H. WOOD, Appellee.

In this cause it is agreed that the records of the United States Circuit Court show that on July 16, 1907, the ancillary bill which appears in the record sent by the United States Circuit Court to the Supreme Court of the United States was duly filed in said Circuit Court of the United States for the Western District of North Carolina; and that on said day a restraining order was signed by his Honor, Jeter C. Pritchard, United States Circuit Judge, and duly filed in the office of the Clerk of said Court, and that a copy of said restraining order is set out in the certificate of the Clerk hereto at-

tached; and it is agreed by and between W. B. Rodman and Charles A. Moore and Thomas S. Rollins, attorneys representing the petitioner, and James H. Merrimon and J. G. Merrimon, attorneys representing the respondents, that the record in the United States Supreme Court shall be amended so as to show that the said ancillary bill was filed in the Circuit Court of the United States in and for the Western District of North Carolina, on July 16, 1907, and
377 that the restraining order set out in the certificate of the Clerk hereto attached was on said day duly filed; and that this agreement shall be filed with the Clerk of the Supreme Court of the United States and become a part of the record in said cause.

This the 26th day of November, 1907.

W. B. RODMAN,
CHAS. A. MOORE,
THOMAS S. ROLLINS,
Attorneys for the Appellee.
J. H. MERRIMON,
J. G. MERRIMON,
Attorneys for the Appellant.

378 [Endorsed:] File No. 20,877 Supreme Court U. S. October Term, 1907. Term No. 474 Thomas F. Hunter, Sheriff &c., *vs.* James H. Wood. Stipulation of counsel amending transcript of record. Filed Nov. 29th, 1907.

Endorsed on cover: File No. 20,877. W. North Carolina C. C. U. S. Term No. 474. Thomas F. Hunter, sheriff of Buncombe county, State of North Carolina, appellant, *vs.* James H. Wood. Filed October 5th, 1907. File No. 20,877.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1907.

THOMAS F. HUNTER, Sheriff of Buncombe County, State of North Carolina,
Appellant,

vs.

JAMES H. WOOD,
Appellee.

No. 474.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

Motion to Advance.

And now comes the Appellee in the above-entitled cause and upon the record therein in this Court, moves the Court that said cause be advanced and set down for hearing at the earliest convenient day of the present Term.

Statement of the Matter Involved,

The Southern Railway Company instituted a suit in equity in the Circuit Court of the United States for the Eastern District of North Carolina against Franklin McNeill and others, officers of the State of North

Carolina, to prevent the execution of two statutes of the State of North Carolina, one directing the reduction of intra-state passenger rates and the other directing the reduction of intra-state freight rates, and as ground for such relief averred that each of the statutes was repugnant to the Constitution of the United States. An order was made enjoining defendants and all other persons, until the further order of the Court, from enforcing either of the statutes, and prescribing and directing the manner in which the Railway Company and its employes should charge and make record of rates in excess of those fixed by the statutes.

Appellee, an employe of the Railway Company, was tried, convicted and sentenced to imprisonment by a court of North Carolina on the charge of selling tickets, (while the order of injunction was in effect), at a greater rate than the rate prescribed by one of the statutes. The court below, in pursuance of a writ of *habeas corpus* issued by it and addressed to appellant as the sheriff of Buncombe County, North Carolina, released appellee from imprisonment upon the ground that the act for which appellee was in custody had been done in pursuance of the order of injunction in the suit of Southern Railway Company against McNeill and others.

This case is an appeal from the order discharging appellee from custody and involves the claim that the suit of Southern Railway Company against McNeill is a suit against the State of North Carolina, and that therefore the order of injunction was void, and the further claim that the enforcement of the criminal statutes of North Carolina cannot be interfered with by the courts of the United States.

Reasons for This Application.

The questions involved are of great public importance at this time. Similar questions are involved in suits now pending in several of the Circuit Courts of

the United States. Serious conflicts of jurisdiction and authority between the courts of the United States and the executive and judicial departments of some of the States have recently been imminent on account of diverse views upon these questions. Additional statutes have just been passed in some of the States which probably will lead to further controversies of this character.

There is now pending in this Court the proceeding entitled "In the Matter of Edward T. Young, Petitioner," No. 10 original, which involves questions similar in many respects to the questions involved herein, and which is to be argued in the next few days. It is believed that the court in considering the questions involved in that proceeding will be greatly assisted by having before it at the same time the statutory conditions and the facts disclosed by the record herein.

Washington, D. C., Dec. 2, 1907.

ALFRED P. THOM,
WALKER D. HINES,
Of Counsel for Appellee.

DEC 18 1907
JAMES H. McKENNE
CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

NO. 474.

THOMAS F. HUNTER, SHERIFF OF BUNCOMBE COUNTY, NORTH CAROLINA,

versus

JAMES H. WOOD.

BRIEF IN BEHALF OF APPELLANT

E. J. JUSTICE,
Attorney for Appellant.

Edwards and Broughton Printing Co., Raleigh.

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In the Supreme Court of the United States,

OCTOBER TERM, 1907.

No._____

THOMAS F. HUNTER, SHERIFF OF BUNCOMBE COUNTY, NORTH CAROLINA,

versus

JAMES H. WOOD.

BRIEF IN BEHALF OF APPELLANT.

STATEMENT OF FACTS.

The General Assembly of North Carolina, at its regular session in 1907, passed an act fixing the maximum passenger fares, to be charged by certain railroad companies in North Carolina, on intra-state transportation.

The act was ratified March 2, 1907, and became operative on July 1, 1907, and is now Chapter 216 of the Public Laws of North Carolina, session 1907.

The full text of the act is as follows:

CHAPTER 216.

AN ACT PRESCRIBING THE MAXIMUM CHARGES RAILROAD COMPANIES MAY MAKE FOR TRANSPORTING PASSENGERS IN NORTH CAROLINA.

The General Assembly of North Carolina do enact:

SECTION 1. That no railroad company doing business as a common carrier of passengers in the State of North Carolina, except as hereinafter provided, shall charge, demand or receive for transporting any passenger, and his or her baggage not exceeding in weight two hundred pounds, from any station on its railroad in North Carolina, a rate in excess of two and one-

quarter centsquarter cents per mile, and for transporting children twelve years of age or under, one-half of the rate above prescribed. *Provided,* that the Corporation Commission of North Carolina is hereby authorized and empowered to permit all independently owned and operated railroad companies in North Carolina, whose mileage of road in said State is sixty miles or under, to charge a rate for transporting passengers not in excess of the present rate fixed and prescribed for said road; and also to permit all railroads constructed within the twelve months preceding the first day of January, one thousand nine hundred and seven, or at that time in course of construction, for a term of two years from and after July first, one thousand nine hundred and seven, and also such railroads as may be constructed within two years from January the first, one thousand nine hundred and seven, to charge such rate in excess of the rate above prescribed as the said Commission may determine to be reasonable. A charge of ten cents may be added to the fare of any passenger when the same is paid upon the cars if a ticket might have been procured within a reasonable time before the departure of the train; and no railroad company shall be required to accept a single fare of less than five cents.

Sec. 2. In the case that any railroad company operating as a common carrier of passengers in the State of North Carolina is owned, controlled or operated by lease or other agreement by any other railroad company doing business in said State, the rate for carrying passengers thereon as prescribed by this act shall be determined for said railroad by the rate prescribed by this act for the railroad company which owns, controls or operates the same; and the North Carolina Corporation Commission shall publish the rates fixed by this act for the several railroad companies operating in this State, on or before the first day of June, one thousand nine hundred and seven.

Sec. 3. That mileage-books of one thousand miles in each book shall be kept on sale at such railroad ticket office in North Carolina as shall be named and designated by the Corporation Commission of North Carolina, and when such mileage-book is purchased it shall be good in the hands of any person or persons named therein on all railroads on which the fare is the same as or less than the fare on the roads of the company selling such mileage-book; and when the mileage is detached from said book by any other railroad company than the one which sold it, the said mileage shall be redeemable on demand by the railroad company which sold it.

Sec. 4. That any railroad company violating any provision of this act shall be liable to a penalty of five hundred dollars, for

each violation, payable to the person aggrieved by such vioaltion, and recoverable in an action to be instituted in the name of said person in any court of this State having competent jurisdiction thereof. And any agent, servant or employee of any railroad company violating this act shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the Court.

SEC. 5. That any person or persons, except those permitted by law, who accept free transportation, shall be guilty of a misdemeanor and, upon conviction shall be fined or imprisoned, or both, in the discretion of the Court.

SEC. 6. That section two thousand six hundred and eighteen of the Revisal of one thousand nine hundred and five is hereby repealed, and all laws and clauses of laws in conflict with this act are hereby repealed.

SEC. 7. That this act shall be in force from and after July first, one thousand nine hundred and seven.

In the General Assembly read three times, and ratified this the 2d day of March, A. D. 1907.

On May the 8th, 1907, the Southern Railway Company, a common carrier of freight and passengers, in North Carolina, being one of the companies affected by the maximum passenger rate fixed by the act referred to, filed a bill in equity in the Circuit Court of the United States, for the Eastern District of North Carolina, on behalf of itself as complainant, against the three Corporation Commissioners, and the Attorney General, and Assistant Attorney General, of the State of North Carolina, as defendants, with the purpose of preventing the maximum rates of two and one-quarter cents becoming effective, and on that day his Honor, J. C. Pritchard, United States Circuit Judge, issued a temporary restraining order, and required the persons named as defendants, to appear before him, on the 26th day of June, 1907, to show cause why an injunction should not be issued.

The defendants appeared, in response to the notice, and challenged the jurisdiction of the United States Circuit Court to entertain the suit against them.

After a hearing, the Court not having found the rate fixed was confiscatory, or that the act appeared to be unconstitutional for any reason, on June the 29th, 1907, granted an interlocutory injunction, and referred the suit to a Master.

Prior to the taking of testimony by the Master, but after the first day of July, 1907, the appellee, James H. Wood, the ticket agent of the Southern Railway Company, sold a passenger ticket over the said Railway Company's line, from one point in the State of North Carolina, to another point within that State, and demanded and received therefor, more than two and one-quarter cents per mile. Wood was, upon a warrant issued by a Police Court of the State of North Carolina, having jurisdiction to try persons for misdemeanors, arrested, tried and sentenced; and was in custody of the Sheriff of Buncombe County, North Carolina, by virtue of that sentence, when his Honor, J. C. Pritchard, United States Circuit Judge, issued a writ of *habeas corpus,* and had the prisoner brought before him, by the said State officer, and after a hearing discharged Wood from custody; and from that order, Thomas F. Hunter, the Sheriff, appealed to this Court.

The Constitution of the State of North Carolina provides, with reference to the duties of the Attorney-General, as follows:

ARTICLE III.

SECTION 1. The Executive Department shall consist of a Governor, in whom shall be vested the supreme executive power of the State, a Lieutenant-Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, and an Attorney-General, who shall be elected for a term of four years by the qualified electors of the State, at the same time and places and in the same manner as members of the General Assembly are elected.

ARTICLE III.

SEC. 13. The respective duties of the Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction and Attorney-General shall be prescribed by law.

ARTICLE III.

SEC. 14. The Secretary of State, Auditor, Treasurer and Superintendent of Public Instruction shall constitute, *ex-officio,* the Council of State, who shall advise the Governor in the execution of his office, and three of whom shall constitute a quorum. Their advice and proceedings in this capacity shall be entered in a journal to be kept for this purpose exclusively, and signed by the members present, from any part of which any member may enter his dissent; and such journal shall be placed before the

General Assembly when called for by either House. The Attorney-General shall be, *ex officio*, the legal adviser of the Executive Department.

The duties of the Attorney-General as provided by the statute are, generally, such as are prescribed for Attorneys-General of the various States of the Union.

Particular sections of Revisal of North Carolina are referred to by the Southern Railway Company in the proceedings in the suit in equity, for the purpose of undertaking to show that ministerial and particular duties were imposed upon the Corporation Commission and the Attorney-General, relative to the enforcement of the Act of 1907, fixing maximum passenger fares.

These particular sections are:

Section 2567, which gives to the railroad companies power to carry persons and property, and to regulate the time and manner of doing so, and fix the compensation therefor.

Section 2618, which provides for two classes of passengers.

Section 1099, which confers power upon the Commission to fix reasonable and just freight and passenger rates and charges for service there specified, and to otherwise regulate railroads.

Section 1104, which prescribes what shall be done by the Commission when it fixes maximum rates.

Section 1106, which provides for the revising of rates fixed by the Commission.

Section 1109, which provides that the Commission may require publication of rates for the convenience of the public.

Section 1112, which provides that the schedule of rates fixed by the Commission shall be *prima facie* evidence, etc.

Section 1078, sub-section 4, which provides that the rates when fixed by the Commission may be appealed from to the State courts, and providing that the railroad company appealing may have the rates fixed by the Commission, vacated pending appeal, by giving bond.

Section 1078, sub-section 5, which provides for injunction by a Judge during the pendency of an appeal from the order of the Commission.

Section 1086, which provides that any railroad company violating the rules of the Commission, and not making recompense for the wrong done, within thirty days, etc., shall be subject to penalty.

Section 1087, which provides for the railroad company violating any provision of chapter 20 of the Revisal, or any of the

orders of the Commission, shall be subjected to a penalty in addition to those already prescribed.

Section 1092, which provides that any suit for penalty prescribed by said chapter shall be instituted in the name of the State, on relation of the Corporation Commission, etc., and such action shall be prosecuted by the Attorney-General, or a Solicitor.

Section 1066, which gives the Corporation Commission general control over railroads.

Section 1113, which provides that whenever any corporation has violated the law, the Commission shall, if the Corporation does not desist upon notice, present the matter to the Attorney-General, who shall take such proceedings thereon as he shall deem expedient.

Section 5380, which prescribes the general duties of the Attorney-General.

This section is as follows:

"It shall be the duty of the Attorney-General—

1. To defend all actions in the Supreme Court, in which the State shall be interested, or is a party; and also when requested by the Governor, or either branch of the General Assembly, to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested.

2. At the request of the Governor, Secretary of State, Treasurer, Auditor, Corporation Commissioners, Insurance Commissioner, or Superintendent of Public Instruction, he shall prosecute and defend all suits relating to matters connected with their departments.

3. To represent all State institutions, including the State's Prison, whenever requested so to do by the official head of any such institution.

4. To consult with and advise the Solicitors, when requested by them, in all matters pertaining to the duties of their office.

5. To give, when required, his opinion upon all questions of law submitted to him by the General Assembly, or by either branch thereof, or by the Governor, Auditor, Treasurer, or any other State officer.

6. To pay all moneys received for debts due or penalties to the State immediately after the receipt thereof into the treasury.

For the purpose of explanation of a decision of the Supreme Court of North Carolina, the facts are given of a case arising

under chapter 216, Public Laws of 1907, decided since this appeal was taken. These do not appear from the record in this case, but do appear in the opinion of the Supreme Court of the State in the case referred to.

The Solicitor for one of the Judicial Districts of North Carolina sent a bill of indictment before the Grand Jury of the Superior Court of Wake County, against the Southern Railway Company, and one of its agents, for selling tickets at a greater rate than two and one-quarter cents per mile, in violation of the statute.

A true bill was found, and the defendants were both convicted, and upon the trial Court fining the railway company it appealed to the Supreme Court of the State. The Supreme Court held, that under the statute the corporation was not indictable, and arrested the judgment. Upon the trial of that case in the Superior Court of the State the Railway Company challenged the jurisdiction of the State Court upon the ground that there was pending in the Circuit Court of the United States the equity suit already referred to herein, and a complete copy of the transcript of the record in the equity suit was introduced to support the plea to the jurisdiction of the State Court.

While the Supreme Court of the State arrested the judgment upon the ground stated, it felt called upon to decide, and did decide, the question of jurisdiction, and also construed the statute, chapter 216 of the Acts of 1907.

The full text of the opinion of the Court in that case will be filed with the Court, but I quote the following from it:

"The act provides (Public Act of 1907, chap. 216, sec. 7), that it shall be in force from and after July 1, 1907, and the provision that the Corporation Commission is required to publish the rates 'fixed by the act' on or before June 1, 1907, for the information of the public and the railroads concerned is directory, and was not intended to stay the operation of the act beyond July 1, 1907, should the Commission fail in the performance of that duty, nor in law, by any reasonable construction of the act, does it have any such effect. The maximum rate prescribed by the act was unconditionally effective from and after July 1, 1907, and the act was therefore self-executing. For this reason alone, if for no other, the suit in equity pending in the United

States Circuit Court can not be permitted to affect the proceedings in the court below in this case."

There is involved in the suit in equity entitled *The Southern Railway Company v. McNeill et al., Corporation Commission and Attorney-General,* the validity of an act fixing certain freight rates and which the complainant says will, if enforced, cause an annual loss to it of twenty thousand dollars.

That act is framed upon different ideas from those upon which the passenger rate law is based.

The one in no way relates to the other. The freight rate law imposes special duties upon the Corporation Commission, but as it in no way effects the duties of the members of the Corporation Commission, and the Attorney-General, with reference to the Passenger Rate Act, it need not be referred to further

ARGUMENT.

There can be no question about the authority of the State, through its Legislature, to fix maximum passenger rates upon the intra-state passenger business done within its boundaries. I do not understand that this power is questioned, but if it be it is sufficient to quote from the opinion of the Supreme Court of the United States, delivered by Mr. Justice Brewer, in *Chicago and G. T. R. Co. v. Wellman,* the following:

"If the contention be that the Legislature has no power in the matter, and that an act fixing rates, however high they may be, is necessarily unconstitutional, it is enough to refer to the long series of cases in this court in which the contrary has been decided. The Legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

Stone v. Farmers L. & T. Co., 116 U. S., 307.
Chicago M. & St. P. R. Co. v. Minnesota, 134 U. S., 418.

It is equally well settled that the State, in the exercise of its police power, may, by legislative enactment, constitute it a criminal offense for an agent of a common carrier, or public service

corporation, to sell tickets at a rate in excess of that allowed by law.

Fitts v. McGhee, 172 U. S., 416.

There can be no ground for the contention that the ticket agent, Wood, the appellee, was not rightfully arrested and held in custody by the Sheriff of Buncombe County, the appellant, under the warrant and sentence of the Court of the State of North Carolina, except that all indictments of and proceedings against, agents of the Southern Railway Company, for selling tickets at over 2¼ cents were illegal, that State Courts of North Carolina were without jurisdiction, for the reason that there was pending in the Circuit Court of the United States a suit in equity, in which the Southern Railway Company was complainant and the members of the North Carolina Corporation Commission, the Attorney-General and the Assistant Attorney-General of the State of North Carolina were defendants, and that at the instance of the complainant there was issued in that suit an injunction against the maximum rate of 2¼ cents becoming effective.

THE SUIT IN EQUITY AGAINST THE MEMBERS OF THE NORTH CAROLINA CORPORATION COMMISSION, FRANKLIN McNEILL, S. L. ROGERS, AND E. C. BEDDINGFIELD, IS, IN SO FAR AS IT RELATES TO THE PASSENGER RATES, A NULLITY, AND DOES NOT HELP THE JURISDICTION OF THE CIRCUIT COURT OF THE UNITED STATES.

Section 1 of the passenger rate act makes it unlawful for railway companies falling within the class mentioned in that section to sell passenger tickets from any station on its road in North Carolina, to any other station on its road in North Carolina, at a rate in excess of 2 1-4 cents per mile. It is provided in section 2 of the act that the Corporation Commission shall publish the rates fixed by the act for the several railroad companies operating in the State, on or before the first day of June, one thousand nine hundred and seven. The Southern Railway

Company falls within the class of railway companies which are not allowed to charge more than 2 1-4 cents per mile.

The Supreme Court of North Carolina has decided, in the case of *State v. Southern Railway Company*, printed copies of the opinion being filed with this court, that the North Carolina passenger rate Act of 1907 is self-executing, and became operative on the first day of July, 1907, and that the provision of the act that the Corporation Commission should publish the rates fixed by the act, was directory merely, and that the act becoming effective, in no way depended upon the Corporation Commission's complying with the direction to publish the rates. This construction of the Supreme Court of the State is manifestly the only one the act is susceptible of.

It was sought by the appellee, Wood, upon the return to the writ of *habeas corpus* issued by the Circuit Judge, to show that certain other acts of the Legislature of North Carolina gave to the Corporation Commission the power to fix rates, and made it its duty, to impose penalties upon railroad companies for a failure to comply with certain laws of the State of North Carolina, and orders of the Corporation Commission, and made it the duty of the Commission and the Attorney General, under certain circumstances, to enforce the penalties. It was sought to construe these various statutes, together with chapter 216 of the Acts of 1907—the passenger rate Act—presumably for the purpose of showing that duties were imposed upon the members of the North Carolina Corporation Commission and the Attorney General, ministerial in their character, and which, if carried out, would constitute a trespass upon, and an infringement on, the constitutional rights of the Southern Railway Company. This argument seems to have had some influence upon the Circuit Judge, but an examination of it shows that it is wholly fallacious.

The passenger rate Act of one thousand nine hundred and seven stands alone, in so far as it has reference to the maximum passenger rate of 2 1-4 cents upon the class of railroad companies to which the Southern Railway Company belongs. The only penalties prescribed which were intended by the Legislature to be enforceable are those specified in section 4 of the act.

The argument advanced by the appellee, and the idea which

must have influenced the Circuit Judge in granting the injunction, by which it was inteded to keep the maximum passenger rates on the Southern Railway Company at more than 2 1-4, that the Corporation Commission still had the right to fix the passenger rates notwithstanding the act of 1907, does not affect this case, even if the argument is sound, which it is earnestly insisted it is not, unless the Corporation Commission had the power to fix the maximum passenger rates on the Southern Railway Company, and other railroad companies belonging to its class, *at more than* 2 1-4 *cents per mile.*

If it could be successfully contended, and it is earnestly insisted that it can not be, that the passenger rate on the Southern Railway Company might be fixed, notwithstanding the passenger rate Act of 1907, at less than 2 1-4 cents per mile, it seems to be perfectly clear that certainly no power is left to the Corporation Commission to fix the rate on the Southern Railway Company and other railroad companies classified with it by the act, at more than 2 1-4 cents per mile.

Certainly the Attorney General had no right to fix the rates, and it is not suggested that he had any such power.

If the defendants in the equity suit brought by the Southern *Railway Company v. Franklin McNeill,* S. L. Rogers and E. C. Beddingfield, Corporation Commissioners, and the Attorney-General and Assistant Attorney, had no power, if they had willed to do so, to fix the rates above 2 1-2 cents, does it not follow as the night follows the day, and is it not a perfectly patent proposition that the Circuit Court of the United States could not, by an injunction against them, put the rates higher than they had the power to put them?

If the Circuit Court of the United States did not have the power to make an order without any suit pending before it,—and of course, in the very nature of things, it could have no such power,—then upon what principle or theory could it acquire this power, by virtue of a suit pending in the Court in which the defendants not only did not claim, but could not successfully claim, or assert the power to fix the rate *at more than* 2 1-4 *cents?*

Before the Circuit Court of the United States can lawfully issue an injunction affecting the rates fixed by the Legislature

of North Carolina, it must have before it as parties to a suit those who could themselves fix the rate.

This is not a suit, the purpose of which is to enjoin the defendants from enforcing penalties merely, but it has a more far-reaching purpose, to-wit: change of legislative rates by a decree of court.

To enjoin the enforcement of penalties against the railroad companies in a suit against those who have the power to and are threatening to enforce such pealties, is one thing, but to undertake to justify the suit upon this ground, and then go further and raise the rates, is quite another thing.

It is earnestly insisted that the suit in equity, in so far as it was thereby attempted to affect the passenger rates, fails for lack of jurisdiction of the Circuit Court of the United States;

First. Because the passenger rate act of one thousand nine hundred and seven is self-executing, and the penalties there prescribed are the only penalties which can be enforced, and that these can not be enforced at the instance of, or by the defendants in the suit, unless by the Attorney-General in the exercise of his executive discretion, and this point will be discussed later.

Second. That if the power to enforce the penalties in that suit existed in the defendants, they have not the power to raise the rates, and the purpose of the suit is by means of an injunction, to raise the rate above what is lawful.

It will be observed also, that the Circuit Court of the United States issued its injunction without finding that the rate was confiscatory. The Circuit Court has, by its decree, undertaken to suspend the operation of an act which has never been declared even *prima facia* in conflict with the organic law of the land.

The proposition presented by the ruling of the Circuit Court is not whether the Court can declare unconstitutional an act of the Legislature of North Carolina, but whether it can suspend the operation of an act presumably constitutional and valid.

The point which I have undertaken to make in this case has the support of this Court.

In the case of *St. Louis and S. F. R. Co. v. Gill*, 156 U. S., 666, it was said:

"Sometimes in acting on this subject the State Legislatures have created commissions or boards of public works with power to establish rates for the transportation of passengers and freights, and in such instances the course recommended by Mr. Jutice Miller may well be followed; that the remedy for a tariff alleged to be unreasonable should be sought in a bill of equity or some equivalent proceeding wherein the rights of the public as well as those of the company complaining can be protected. But there are other cases and the present is one, where the Legislatures choose to act directly on the subject by themselves establishing a tariff of rates and prescribing penalties. In such cases there is no opportunity to resort to a compendious remedy such as a bill in equity, because there is no public functionary or commission which could be made to respond, and, therefore, if the companies are to have any relief it must be found in the right to raise the question of reasonableness of the statutory rates by way of defense to an action for the collection of penalties."

The recent decisions of this Court upon questions closely kindred to those involved in this case, and the recent elaborate citation of authorities in a somewhat similar case, now pending before this Court (The Minnesota case) causes me to feel that the most service I can be to the Court, if I can aid it at all, is in undertaking to place the case at bar in its proper class with other cases decided by this Court.

MY MAIN PURPOSE WILL, THEREFORE, BE TO SHOW THAT THIS CASE FALLS IN THE CLASS OF CASES, WHICH THIS COURT HAS HELD CAN NOT BE MAINTAINED, AGAINST STATE OFFICERS, BECAUSE THOSE CASES WERE, WITHIN THE MEANING OF THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, SUITS AGAINST STATES.

Before discussing that particular question, however, I desire to discuss three others closely connected with it, and to a degree involving it.

A COURT OF EQUITY CAN NOT ENJOIN CRIMINAL PROCEEDINGS.

This applies alike to all courts of equity, whether, in England or the United States Courts, or State Courts.

Suess v. Noble, 31 Fed., 835.
Hensley v. Meyers, 45 Fed., 283.
High on Injuction, paragraphs 28 and 30.

Since courts of equity deal only with civil and property rights, they will not interfere with criminal proceedings, and this is true even though the court of equity already had jurisdiction over the parties to the subject matter concerning which the criminal matter is instituted.

High on Injuction, paragraph 68.

Lord Chief Justice Holt, of the Queen's Bench, is reported in the case of *Holderstaff v. Saunders,* 1 Mod., 16, as follows:

"Sure chancery will not grant an injunction in a criminal matter under examination in this court, and if they did the court would break it, and would protect any one that would proceed in contempt of it."

This quotation is quoted with approval in *Ex Parte Sawyer,* 124 U. S., 200. In this latter case, the Circuit Court of the United States issued an injunction against the city officials of the city of Lincoln, Neb., enjoining them from proceeding under an ordinance to inquire into the right of one Parsons to hold the office of Police Judge. Parsons alleged that his rights were being infringed contrary to the Constitution of the United States. The officers of the city violated the injunction, contending that the Circuit Court of the United States was without jurisdiction to issue it. They were attached for contempt of the Circuit Court, and sued out a writ of *habeas corpus* before the United States Supreme Court. Mr. Justice Gray delivered the opinion, from which the following is quoted:

"Under the Constitution and the laws of the United States the distinction between common law and equity, as existing in

England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. *Fenn v. Holmes,* 62 U. S., 21 How., 481, 484-487 (16, 198-200); *Thompson v. Central Ohio R. R. Co.,* 73 U. S., 6 Wall., 134 (L. Ed., 18, 765); *Heine v. Levee Comrs.,* 86 U. S., 19 Wall., 655 (22 L. Ed., 223).

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecutor, the punishment, or the pardon of crimes or disdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity, to restrain or relieve against proceedings for the punishment of offences, or for the removal of public officers, is to invade the domain of courts of common law, or the executive and administrative department of the Government.

"Any jurisdiction over the criminal matters that the English Court of Chancery ever had became obsolete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of *habeas corpus* for the discharge of persons unlawfully imprisoned. 2 Hale, P. C., 147; *Gee v. Pritchard,* 2 Swanst., 402, 413; 1 Spence Eq., Jur., 689, 690; *Attorney-General v. Utica Ins. Co.,* 2 John. Ch., 371, 387.

"From long before the Declaration of Independence it has been settled in England that a bill to stay criminal proceedings is not within the jurisdiction of the Court of Chancery, whether those proceedings are by indictment or by summary process.

* * * * * * *

"Lord Chancellor Hardwicke, while exercising the power of the Court of Chancery, incidental to the disposition of a case pending before it, of restraining a plaintiff, who had by his bill submitted his rights to its determination, from proceeding as to the same matter before another tribunal, either by indictment or by action, asserted in the strongest terms the want of any power or jurisdiction to entertain a bill for injunction to stay criminal proceedings, saying: 'This court has not originally and strictly any restraining power over criminal prosecutions'; and again: 'This court has no jurisdiction to grant an injunction to stay proceedings on a *mandamus;* nor to an indictment; nor to an information; nor to a writ of prohibition, that I know of.' *Mayor, etc., and Corporation of York v. Pilkinton,* 2 Atk., 302; S. C., 9 Mod., 273; *Montague v. Dudman,* 2 Ves. Sr., 396."

(Of course, the difference between an order in Chancery restraining a plaintiff who has selected that forum, and an injunction against the officers of a State, is apparent.)

"The modern decisions in England, by eminent equity judges, concur in holding that a court of Chancery has no power to restrain criminal proceedings, *unless they are instituted by the party to a suit already pending before it*, and to try the same right that is in issue there. *Attorney-General v. Cleaver*, 18 Ves. Jr., 211; *Turner v. Turner*, 15 Jur., 218; *Saull v. Browne*, L. R., 10 Ch., 64; *Kerr v. Preston*, L. R., Ch. D., 463.

"Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine. (Story Eq. Jur., sec. 893.) And in the American courts, so fare as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the State or under municipal ordinances. *West v. Mayor of N. Y.*, 362; *Davis v. American Society, etc.*, 75 N. Y., 362; *Tyler v. Hamersley*, 44 Con., 419, 422; *Stuart v. LaSalle Co.*, 83 Ill., 341; *Devron v. First Municipality*, 4 La. Ann., 11; *Levy v. Shreveport*, 27 La. Ann., 620; *Moses v. Mobile*, 52 Ala., 198; *Gualt v. Wallis*, 53 Ga.. 675; *Phillips v. Stone Mountain*, 61 Ga., 386; *Cohen v. Goldsboro Comrs.*, 77 N. C., 2; *Waters Pierce Oil Co. v. Little Rock*, 39 Ark., 412; *Spink v. Francis*, 19 Fed. Rep., 670 and 20 Fed. Rep., 567; *Suess v. Noble*, 31 Fed. Rep., 855."

Again it is said that opinion:

"It has been contended by both parties in argument that the proceeding of the city council for the removal of Parson upon the charges filed against him is in the nature of a criminal proceeding; and that view derives some support from the judgment of the Supreme Court of Nebraska in *State v. Shelton*, 10 Nev., 452, 456, before cited. But if the proceeding is of a criminal nature, it is quite clear for the reasons and upon the authorities set forth in the earliest part of this opinion, that the case stated in the bill is wholly without the jurisdiction of any court of equity."

And again:

"The Circuit Court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of jurisdiction which it assumed are null and void. The restraining order, in the nature of an injunction, it had no power to make. The adjudication that the defendants were

guilty of a contempt in disregarding that order is equally void; their detention by the marshal under that adjudication is without authority of law, and they are entitled to be discharged."

This doctrine is firmly established by the decisions in the following cases:

Cohen v. Comrs, 77 N. C., 2.
Busbee v. Lewis, 85 N. C., 332.
Busbee v. Macy, 85 N. C., 329.
Pearson v. Boyden, 86 N. C., 585.
Wardens v. Washington, 109 N. C., 21.
Scott v. Smith, 121 N. C., 94.
Vickers v. Durham, 132 N. C., 880.
Paul v. Washington, 134 N. C., 363.
State v. Southern Railway Company, (opinion not yet published in official reports, but copies handed to this Court.)

See also—

Wallace v. Society, 67 N. Y., 28; 16 A. & E. Ency. of Law (2 Ed.) 370, where the rule is stated as follows:

"At one time the Court of Chancery in *England* exercised a jurisdiction partaking of a criminal character, but it was not without objection and protest from the Commons and the common law courts. It was excused, rather than justified, because of the inability of other tribunals to maintain internal peace and order, and because it was exercised for the defense of the poor and helpless. It passed away when the necessity for its exercise ceased, and the common law tribunals were restored to power sufficient for the repression of violence and wrong. It is a well-settled rule, both in England and America, that a court of equity has no jurisidiction to interfere by injunction to restrain a criminal prosecution, whether the prosecution be for violations of statutes or for an infraction of municipal ordinances. The rule applies whether the prosecution is by indictment or by summary process, and to prosecutions which are merely threatened or anticipated as well as to those which have already been commenced. So it is not within the power of the parties to waive the question relating to the jurisdiction of the court and to compel it to try the cause. If the prosecution is under an ordinance, no ground

for enjoining it is constituted by the fact that the ordinance is void, or that the party seeking the injunction has not committed a violation of the ordinance, or that the complaint in the prosecution under the ordinance states no cause of action."

The appellee relies upon the case of *Davis v. City of Los Angeles,* 189 U. S., 207, and the case of *Dobbins v. City of Los Angeles,* 135 U. S., 222, as establishing a rule different from that above announced and established by the long line of decisions cited. This Court did not announce, in those cases, that it was its purpose to overrule the doctrine, that equity will not entertain a suit to enjoining enforcing of criminal law, so firmly established in England and in the courts of the United States and of the various states, and it is not believed that such was the purpose, or effect of the two decisions referred to.

In *Davis v. City of Los Angeles,* the complainant instituted a suit in equity in the Circuit Court for the Southern District of California to enjoin the enforcement of certain municipal ordinances alleged to impair the obligation of a contract, with the municipality, under prior ordinances. The Circuit Court dismissed the bill, and this Court affirmed the judgment of the court, below, so that it was certainly not decided in that case that a bill for that purpose would lie.

In the opinion of the Court delivered by Mr. Justice Brown in that case, this language is found:

"That a court of equity has no general power to enjoin or stay criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there, or to prohibit the invasion of the rights of property by the enforcement of an unconstitutional law, was so fully considered and settled in an elaborate opinion by Mr. Justice Gray, in re *Sawyer,* 124 U. S., 200, that no further reference to prior authorities is deemed necessary, and we have little more to do than to consider whether there is anything exceptional in the case under consideration to take it out of the general rule."

In the case of *Dobbins v. City of Los Angeles,* the Superior Court of the county of Los Angeles, in the State of California, dismissed a bill to enjoin the enforcement of the municipal

ordinance prohibiting the erection of gas works except within certain prescribed limitations. The Supreme Court of California affirmed the judgment of the Superior Court, and the case was reversed by this Court where it was brought upon a writ of error. The principle of enjoining the sovereign, the King or the State, from prosecuting criminal offenses was not passed upon. The proceeding was against a municipality, and the municipality could not have been considered as the sovereign State of California would have been considered, for in that event it would not have been subject to suit. In any event it does not raise the same question that is presented in this case, for the Eleventh Amendment to the Constitution of the United States applies to suits prosecuted *by citizens of another State, or by citizens of a foreign country in the courts of the United States.* That case was decided upon demurrer to the complaint, and the allegations thereof were taken as true. It is said in the opinion in that case, delivered by Mr. Justice Day:

"The Supreme Court of California, as may be gathered from its opinion in this case, based its decision upon the proposition that, as the exercise of the right to control the location and construction of gas works is within the power conferred by the Legislature upon the city, the act of the municipality in question can not be reviewed, because so to do would be a substitution of the judgment of the court, for that of the council upon a matter left within the exclusive control of the legislative body."

It is further said in that opinion:

"It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people of the community."

This Court then says that subject to the limitations mentioned above, it is within the province of the courts to investigate municipal by-laws and ordinances, and even legislative enactments with a view to determine whether they are a lawful exercise of the police power.

In the bill in that case, the allegations of which were admitted by the demurrer, it was alleged that the ordinances were instigated by the Los Angeles Lighting Company, a corporation engaged in a rival business to that of the plaintiff there, to-wit: the manufacturing and supplying of gas, which corporation already had a monopoly. It was also alleged that the action of the municipal authorities complained of was taken for the purpose of protecting the Los Angeles Lighting Company in the enjoyment of its monopoly, and that the ordinances were passed in violation of the vested rights of the complainant.

What is said by this Court in that decision must be read in the light of the facts in that case, and it is no authority to sustain the position taken in this case, that the injunction issued by the Circuit Court in the case of the Southern Railway Company against the North Carolina Corporation Commission and Attorney-General is effective to lock the wheels of the criminal courts of North Carolina, nor does it support the position that courts of equity will enjoin prosecution in the criminal courts.

THE SUIT AGAINST THE ATTORNEY-GENERAL IS A SUIT AGAINST THE STATE, AND IS IN VIOLATION OF THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

That Amendment reads as follows:

"The Judicial powers of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or subjects of any foreign state."

In Ex Parte Ayers, 123 U. S., 443, a statute had been passed by the Legislature of the State of Virginia giving to the Attorney-General and solicitors the right to bring actions against tax-payers of the State who offered certain coupons, issued by the State, in payment of taxes, and placing the burden on such persons to prove the genuineness of the coupons and prescribing the manner of making the proof. A suit in equity was instituted in the Circuit Court of the United States for the Eastern District of Virginia, in which it was contended that the act of

the Legislature referred to was in impairment of the contract rights of those holding the coupons issued under a prior act of the Legislature. An injunction was issued by the Circuit Judge, Hugh L. Bond, and this was disobeyed by the Attorney-General, Mr. Ayers, who was thereupon attached for contempt of court, and upon being placed in custody sued out a writ of *habeas corpus* before the Supreme Court of the United States. The Supreme Court held that the petitioner was entitled to his discharge, because the Eleventh Amendment to the Constitution of the Unted States ousted the jurisdiction of the Circuit Court, and all its proceedings had in that case were void.

The following expressions are quoted from the opinion of the Court, delivered by Mr. Justice Matthews:

"The question really is whether the Circuit Court had jurisdiction to entertain the suit in which that order was made, because the sole purpose and prayer of the bill was by final decree perpetually to enjoin the defendants from taking any steps in execution of the act of May 12, 1887. The principal contention on the part of the petitioners is that the suit nominally against them is, in fact, and in law, a suit against the State of Virginia, whose officers they are, jurisdiction to entertain which is denied by the Eleventh Amendment to the Constitution, which declares that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.' It must be regarded as the settled doctrine of this court, established by its recent decisions, 'that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record,' *Poindexter v. Greenhow*, 114 U. S., 270, L. Ed. 29, 185. This is true, is not in harmony with what was said by Chief Justice Marshall in *Osborn v. Bank of U. S.*, 22 U. S., 9 Wheat., 738 (L. Ed. 6, 204). Accordingly in *Cunningham v. Macon B. R. R.*, 139 U. S., 446 (L. Ed., 37, 992), it was decided that those cases where it is clearly seen upon the record that a State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction.

"The relief so sought is against the defendants, not in their individual, but in their representative capacity as officers of the State of Virginia. The acts sought to be restrained are the

bringing of suits in the State of Virginia in their name and for their own use. If the State had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing that such a suit could be maintained—it would have been subject to the jurisdiction of the court by a process served upon its Governor and Attorney-General, according to the precedents in such cases. If a decree could have been rendered enjoining the State from bringing suit against its tax-payers, it would have operated upon the State only through the officers who by law are required to represent it in bringing such suits, namely, the person itself, its Attorney-General, and the Commonwealth's Attorney for the several counties. For a breach of such an injunction, these officers would be amenable to the court as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and imprisonment. The nature of the case, as supposed, is identical with that the case is actually presented in the bill, with the single exception that the State is not named as a defendant. How else can the State be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, attorneys and agents? And if all such officers, attorneys and agents are personally subject to the process of the court, so as to forbid their acting in its behalf, how can it be said that the State itself is not subject to the juridiction of the court as an actual and real defendant? It is, however, insisted upon in argument that it is within the jurisdiction of the Circuit Court of the United States to restrain by injunction officers of the State from executing the provisions of State statutes, void by reason of repugnancy to the Constitution of the United States; that there are many precedents in which that jurisdiction has been exercised under the jurisdiction of this court, and that the present case is covered by their authority."

The Court, after reviewing the authorities relied on in support of this position, held with the petitioner that it was a suit against the State, and that the proceeding again him for contempt was null and void, and the petitioner was discharged. The language of the Court is:

"It is therefore within the prohibition of the Eleventh Amendment to the Constitution. *By the terms of that provision it is a case in which the judicial power of the United States does not extend.* The Circuit Court was *without jurisdiction* to entertain it. All the proceedings in the exercise of the jurisdiction

which it assumed are null and void. The orders forbidding the petitioners to bring the suits, for bringing which they were adjudged in contempt of its authority, it had no power to make. The orders adjudging them in contempt were equally void, and their imprisonment is without authority of law."

The decision of this Court in the case of *Pennoyer v. McConnaughy*, 140 U. S., 1, was delivered by Mr. Justice Lamar, and is in part as follows:

"It is well settled that no action can be maintained in any Federal Court by the citizens of one of the States against a State, without its consent, even though the sole object of such suit be to bring the State within the operation of the constitutional provision which provides, 'No State shall pass any law impairing the obligation of contracts.' This immunity of a State from suit is *absolute and unqualified*, and the constitutional provision securing it is not so construed as to place the State within the reach of the process of the court. Accordingly it is equally well settled that a suit against officers of a State to compel them to do the acts which constitute a performance by it of its contracts is, in effect, a suit against the State itself. In the application of this latter principle two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that different views have been presented. The first class is when the suit is brought against the officer of the State, as representing the State's action and liability, making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts.

"The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State."

In the case of *Fitts v. McGee*, 172 U. S., 416, McGee and others had been appointed receivers of a railroad company, which owned a bridge company, which latter company maintained a bridge across the Tennessee River. The Legislature of Alabama passed an act fixing the maximum charges for use of the bridge by the public, and providing that the officers, agents and employees of the company, as well as the company,

should be liable to suits for penalties for making a greater charge than that allowed by law. There was a general statute of the State making it a misdemeanor for agents of bridge and road companies, having a right to charge toll, to charge more than the maximum amount fixed by the statute. The receivers instituted a suit in the Circuit Court of the United States against the Attorney-General of the State and the solicitor of one of the judicial circuits of Alabama, charged with the enforcement of the law, with a view of enjoining them from doing so. It was contended that certain employees of the bridge company had already been arrested, and that the penalties attached to the numerous indictments found and threatened, and the penalty suits threatened, deterred the complaintants from presenting their grievances, and that their property by reason of the late rate fixed by the statute, was being confiscated in violation of Eleventh Amendment to the Constitution.

In delivering the opinion of the Court, Mr. Justice Harlan used this language:

"The principal question before us is whether this suit is one of which a Circuit Court of the United States may take cognizance, consistently with the Constitution of the United States."

Again:

"What is and what is not a suit against a State has so frequently been the subject of consideration by this Court that nothing of importance remains to be suggested on either side of that question. It is only necessary to ascertain, in each case as it arises, whether it falls on one side of a line marked out by our former decisions. We are of opinion that the present case comes within the principles announced in Re Ayers, 123 U. S., 443."

The Justice quotes the following from the Ayers case:

"The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the com-

plaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests."

After quoting further from the Ayers case, Mr. Justice Harlan proceeds as follows:

"If these principles be applied in the present case there is no escape from the conclusion that, although the State of Alabama was dismissed as a party defendant, this suit against its officers is really one against the State. As a State can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings, in execution of the statute of February 9, 1895, is one which restrains the State itself, and the suit is consequently as much against the State as if the State were named as a party defendant on the record. *If the individual defendants held possession or were about to take possession, or to commit any trespass upon, any property belonging to or under the control of the plaintiffs,* in violation of the latter's constitutional rights, they could not resist the judicial determination, in a suit against them, of the question of the right of such possession, by simply asserting that they held were entitled to hold the property in their capacity as officers of the State. In the case supposed they would be compelled to make good the State's claim against suits because of their official character."

Judge Harlan calls attention to the fact that no special duty was imposed on either the Attorney-General or the Solicitor by the Alabama act. Neither is there here with reference to fixing the maximum rate of 2 1-4 cents, and that is what the suit is about, and the injunction seeks to prevent.

Reliance is placed by the defendant upon the case of *Smythe v. Ames,* 169 U. S., 466. Of that case and other cases in the same line Mr. Justice Harlan says in *Fitts v. McGee, supra*:

"In support of the contention that the present suit is not one against the State, reference was made by counsel to several cases, among which were *Poindexter v. Greenhow,* 114 U. S., 270; *Allen v. Baltimore and Ohio Railroad Co.,* 114 U. S., 311; *Pennoyer v. McConnaughy,* 140 U. S., 1; *Re Tyler,* 149 U. S.,

164; *Regan v. Farmers Loan and Trust Co.*, 154 U. S., 362; *Scott v. Donald*, 165 U. S., 58; and *Smyth v. Ames*, 169 U. S., 466. Upon examination it will be found that the defendants in each of these cases were officers of the State, specially charged *with the execution of a State enactment* alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals holding official positions under a State, to prevent them, under the sanction of the unconstitutional statute, from committing *by some positive act a wrong or trespass*, and a suit against officers of a State *merely to test the constitutionality* of a State statute, in the enforcement of which those officers will act *only by formal judicial proceedings in the courts of the State.*"

THE INJUNCTION ISSUED BY THE UNITED STATES COURT WAS ISSUED UPON THE IDEA THAT THE DEFENDANTS IN THE EQUITY SUIT HAD SOME PARTICULAR DUTIES IMPOSED UPON THEM BY STATUTES OF THE STATE. THIS IS CLEARLY NOT SO, BUT IF IT WERE, THE EXTENT TO WHICH THE CIRCUIT JUDGE HAS GONE IN DISCHARGING THE APPELLEE, WOOD, IS AN ASSERTION THAT THE INJUNCTION REACHES NOT ONLY THE DEFENDANTS NAMED IN THE BILL, BUT THE JUDGES, GRAND JURIES, AND ALL OFFICERS OF THE STATE COURTS WHO ARE NOT PARTIES TO THE PASSENGER RATE SUIT, AND ARE NOT EVER ALLEGED TO HAVE ANY PARTICULAR DUTIES TO PERFORM WITH RESPECT TO THE PASSENGER RATE ACT.

A court may have jurisdiction of the subject matter and the parties, and yet not have the organic power to make particular orders therein. As long as the Eleventh Amendment is a part of the organic law of the land States can not be sued, and for the same reason that they can not be, any order of the United States Courts, directed against other persons or against all persons must fall short of reaching the State. The Eleventh Amendment to the Constitution of the United States would be

utterly useless and of none effect if it merely protectetd the State and its officers against being made parties to a suit, and yet by a decree of a United States Court, in a suit brought by a citizen of another State or country against a citizen of a particular State, the State Executive and Judicial Departments of the Government would be bound by a decree issued in the case to which they were not parties.

In the case of *Ex Parte Fisk*, 113 U. S., 713, the Circuit Court of the United States had jurisdiction of the subject matter and the parties, and it undertook to order one of the parties to submit to an examination in a manner not provided by the statutes of the United States. A party to the suit who refused to be examined was attached for contempt of the Circuit Court, and he thereupon applied to the Supreme Court of the United States for a writ of *habeas corpus*. Mr. Justice Miller delivered the opinion of the court and said in part:

"But did the Court transcend its jurisdiction in fining the petitioner for contempt? Or rather, did it have the power to make the order requiring him to submit to the preliminary examination? For if it had that power it clearly could enforce obedience to the order by fine and imprisonment if necessary."

The Court thereupon proceeds to show that under the statutes the Circuit Court did not have the power to make the order to discharge the prisoner and uses the following language:

"The Circuit Court was, therefore, without authority to make the orders for the examination of the petitioner in this case, and equally without authority to enforce these orders by process for contempt."

In the case of *Windsorn v. McVeigh*, 93 U. S., 274, Mr. Justice Field, speaking for the Court, said:

."The doctrine invoked by counsel that where a court has once acquired jurisdiction it has the right to decide every question which arises in the cause, and its judgment, however erroneous, can not be collaterally assailed, is undoubtedly correct as a general proposition, but like all general propositions is subject to many qualifications in its application. All courts, even the

highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal, or to particular modes of administering relief such as legal or equitable, or to transactions of a special character such as arise on navigable waters or relate to the testamentary disposition of estates or to the use of a particular process in the enforcement of their judgments. It must act judicially in all things, and can not then transcend the power conferred by the law. If, for instance, the action be upon a money demand, a Court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for libel or personal tort the Court can not order in the case a specific performance of the contract. If the action be for the possession of real property the Court is powerless to attempt in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications."

Therefore, even if the Circuit Court of the United States had jurisdiction of the subject matter and of the parties, in the case of *Southern Railway Company v. The North Carolina Corporation Commission and the Attorney General and Assistant Attorney General*, the order made by that Court fell short of restraining the Judge and other officers of the Police Court, who, in the performance of their duty, had caused the arrest, and had tried and sentenced Wood, the appellee, and therefore, Wood's remedy was the same as that pointed out in *Fitts v. McGhee*, and other cases, to-wit: to set up any defense he might have in the State court, and it is presumed that if he had done so his cause would have been rightfully decided by the State Courts; and if it had not been, then it could have been brought to this court and decided by it without any unseemly proceeding or danger of conflict between State and Federal Courts.

THE SUIT IN EQUITY, ENTITLED "SOUTHERN RAILWAY COMPANY V. THE CORPORATION COMMISSION, THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL OF NORTH CAROLINA," PENDING IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA, FALLS IN A CLASS WITH IN RE AYERS, AND FITZ V. McGHEE, AND IN THAT LINE OF CASES; AND NOT IN A CLASS WITH RAGAN V. TRUST COMPANY, SMYTH V. AMES, AND PROUT V. STAR, AND THAT LINE OF CASES.

The first class of cases, mentioned as being decided by this Court, holds that the Eleventh Amendment to the Constitution of the United States is an absolute protection and bar against suits brought in the United States Courts, by citizens of another State or foreign country, against a particular State; and that it is not material whether the State is the party of record or not; but if its officers, through which the State alone can act, are sued, that it is, within the meaning of the Eleventh Amendment to the Constitution of the United States, a suit against the State.

The second class of cases decided by this Court, and referred to above, holds that State officials can be sued in the United States Courts, by citizens of other States or foreign countries, where there is a Federal question involved that will give jurisdiction, when—

(1) They were, as to the plaintiff, personal wrongdoers and trespassers; or,

(2) The action sought to be controlled was purely ministerial.

No suit has ever been sustained against State officers, as such, unless they were about to commit a trespass for which they would be personally liable, or unless they were performing some special or ministerial duty imposed upon, and required of them, by an act of the Legislature of the State.

RAGAN v. TRUST COMPANY, 154 U. S., 362.

In that case the suit was brought by the Farmers Loan and Trust Company, a foreign corporation, in the State of Texas, as

trustee in a deed of trust executed by a railroad company to secure a second series of mortgage bonds against the railroad company and the members of the Railroad Commission of the State of Texas and the Attorney-General of that State, to enjoin the putting into effect the tariff of rates made by the Commission, and to enjoin the enforcement, by the Attorney-General and the Commission, of such laws. The statute under which the Commission acted, imposed certain penalties upon the railroad company and its agents for disobeying the rules and orders of the Commission relating to such rates fixed by it. The Attorney-General was specially charged with the duty of instituting suits in the name of the State for the recovery of all penalties made payable to the State, and of all penalties imposed by the statute, except those recoverable by individuals. In section 19 of the Texas Act, under consideration in the Ragan case, is the language:

"If such railroad shall refuse or neglect to comply with such order, the Board shall order the Attorney-General or the County Attorney of the proper county to institute a suit to compel such railroad company to comply with such order, and it shall be the duty of the Attorney-General or the County Attorney of the proper county, by the request of the Board, to apply to the Circuit Court for a writ of mandamus, to compel such railroad company to comply with such order."

It was made, by the Texas Act, the mandatory duty of the Board of Railroad Commissioners, and the Attorney-General to enforce the penalties provided against the railroad company by the act.

The appellee in this case, Wood, as do all litigants who deplore and oppose the protection given to the States by the Eleventh Amendment, cited the Ragan case as a leading authority in support of his position, but he ignores the fact that the Court, in its opinion delivered by Mr. Justice Brewer, expressly stated that while that suit was not one against the State, that there was another class of cases from which State officials were rendered immune from suit in the United States Courts by citizens of another State or foreign country, by the Eleventh Amendment to the Constitution of the United States.

Making the distinction between the two classes of cases and referring to the Attorney-General of Texas in the Ragan case, the Court said:

"In these cases he is not sued as or because he is the officer of the government, but as an individual, and the Court is not ousted of jurisdiction because he asserts authority as such officer."

The Court, through Mr. Justice Brewer, also said in that case:

"The question as to when an action against officers of a State is to be treated as an action against the State has been of late several times carefully considered by this Court, especially in the case of *Ex parte* Ayers, 123 U. S., 443, by Mr. Justice Matthews, and *Pennoyer v. McConnaughy,* 140 U S., by Mr. Justice Lamar."

SMYTH v. AMES, 169 U. S., 466.

In that case the suit was brought in the Circuit Court of the United States for the District of Nebraska, by stockholders and citizens of another State, against the Union Pacific Railway Company and other corporations, some of which were incorporated in Nebraska, and certain persons, citizens of Nebraska, who held the offices, respectively, of Attorney-General, Secretary of State, Auditor of Public Accounts, State Treasurer, and Commissioner of Public Land and Buildings, who constituted the State Board of Transportation, and also against three persons, citizens of Nebraska, Secretaries of that Board.

Section 6 of the Nebraska Act, under consideration before the Court in that case, provides that the Board of Transportation is empowered to reduce rates fixed by the act whenever it shall seem just, and to revise and classify freight whenever a majority of the Board shall think it just and reasonable. Section 9 of the Nebraska Act provides that any common carrier disobeying its provisions shall be fined not less than one thousand dollars, and then fines are graduated for repeated offenses.

The injunction issued by Mr. Justice Brewer, presiding in the Circuit Court, prohibited the receivers of the railroad companies, the defendants, from putting into effect the rates provided by the

act, and the members of the Board of Transportation and Secretaries of the Board were enjoined from entertaining any complaint against the railroad companies, or any, or either of them, or their receivers, etc., for disobeying the act, and from instituting or prosecuting any proceeding against either of the companies or their receivers for disobeying the said act; and particularly from reducing its present rates or charges for transportation of freights, to the rates prescribed in that act, and that the Attorney-General be enjoined from bringing or causing to be brought any proceeding of any kind for or on account of any violation of that act. The duties imposed upon the members of the Commission in that case, who also happened to be State officers, were particular, mandatory, and ministerial. It was decided in that case that the suit was not one against the State, though this point was not pressed upon the argument, and the Court, speaking through Mr. Justice Harlan, kept in mind the classification above referred to.

That the Court did have in mind two classes of cases is shown beyond controversy by what is said of *Smyth v. Ames* and other cases like it by Mr. Justice Harlan in *Fitts v. McGhee*, hereinafter more particularly referred to.

PROUT V. STAR, 188 U. S., 537.

In that case, on August 3, 1903, suit was brought in the Circuit Court of the United States for the District of Nebraska by James C. Star and others, stockholders, citizens of Nebraska, against a railway company, and George Hastings, Attorney-General, and others, constituting the Board of Transportation, for the purpose of restraining the company according to the provision of an act of the State of Nebraska, and for the purpose of enjoining the Attorney-General of the State, and others, as members of the Board of Transportation, from entertaining or determining any complaint, or prosecuting any proceeding to enforce the provisions of the act; and also for the purpose of enjoining the Attorney-General from bringing any proceeding for or on account of the non-observance of the act.

The defendants, the members of the Board of Transportation,

insisted that they were officers of the State, and were protected from suit by the Eleventh Amendment to the Constitution of the United States. No testimony was taken in the case of *Prout v. Star*, but it was taken in the case of *Smyth v. Ames, supra*, and the opinion in *Smyth v. Ames* was rendered by this Court March 7, 1898; and there was an agreement in the case of *Prout v. Star* that the proof taken in *Smyth v. Ames* would be accepted as if taken in this case, and that this case should not further be particularly proceeded with until the Supreme Court of the United States should render its decree in the other case, when a decree should be rendered, conformable to the decree entered by the Supreme Court in *Smyth v. Ames*, and certain other cases. Meanwhile Hastings, the Attorney-General, was succeeded in his office by Smith, who, by proper order, was substituted as defendant.

Overlooking or disregarding the preliminary injunction of the Circuit Court and agreement referred to, Smyth brought an action in the Supreme Court of the State of Nebraska against the railway company, alleging that it had charged rates in excess of those fixed by the act, and claiming judgment for three hundred and ten thousand dollars, the amount of penalties alleged to have accrued. The attention of Attorney-General Smyth was then called to the injunction, and he thereupon gave counsel for the company to understand that before the expiration of his term of office he would dismiss the action he had brought.

In January, 1901, Prout succeeded Smyth in office, and he declined to dismiss the action in the Supreme Court of Nebraska. Whereupon the company filed its answer, setting forth the prior pendency of the action in the Circuit Court of the United States, and the existence of the injunction filed therein.

In April, 1901, Star and others filed their supplemental bill in the Circuit Court of the United States, alleging the facts as recited above, and praying that the injunction already issued be extended to Prout, as Attorney-General. He demurred on the ground that the bill was against him in his official capacity, and that the Circuit Court was, under the Eleventh Amendment, without jurisdiction. The demurrer was overruled and the in-

junction issued. It was ordered by the Circuit Court that if Mr. Prout stood by his demurrer and declined further to plead, final decree should go against him, as in the case of *Smyth v. Ames,* and, Mr. Prout electing to stand by the demurrer, a final decree was so entered, and from it he appealed to the Supreme Court.

This Court held that the agreement to abide by the decree in *Smyth v. Ames* was binding, and it is said by this Court that it is not called upon to consider the merits of the case, because they have been concluded by the reasoning and opinion in the other case.

It is said in the opinion of *Prout v. Star:*

"The judicial power of the United States has not infrequently been exercised in securing to the several States the proper government and immunity intended by the Eleventh Amendment."

A number of cases are cited in support of this proposition, one of which is *Fittz v. McGhee.*

What is said with respect to *Smyth v. Ames* not being a suit against the State because it is to enjoin the performance of special or ministerial duties commanded by the act in question, is equally applicable to *Prout v. Star.* Indeed, Prout was proceeding to collect penalties imposed by the act in question, and which the act made it mandatory to collect, and besides there had been a final adjudication by this Court that the said act was unconstitutional, and by reason of the agreement referred to, Mr. Prout was bound by it.

It is manifest, when the facts in the case of *Southern Railway Company v. The North Carolina Corporation Commission and Attorney-General and Assistant Attorney-General* are examined, as they are herein later, that that case does not fall in the class with *Ragan v. Trust Company, Smyth v. Ames* and *Prout v. Star,* and other similar cases.

EX PARTE AYERS, 123 U. S., 443.

In that case a statute had been passed by the Legislature of the State of Virginia giving to the Attorney-General and solicitors the right to bring actions against taxpayers of the State who

offered certain coupons, issued by the State, in payment of taxes, and placing the burden on such persons to prove the genuineness of the coupons and prescribing the manner of making the proof. A suit in equity was instituted in the Circuit Court of the United States for the Eastern District of Virginia, in which it was contended that the act of the Legislature referred to was in impairment of the contract rights of those holding the coupons issued under a prior act of the Legislature. An injunction was issued by the Circuit Judge, Hon. Hugh L. Bond, against bringing suits in the State courts under that statute, and this was disobeyed by the Attorney-General, Mr. Ayers, who was thereupon attached for contempt of court, and upon being placed in custody sued out a writ of *habeas corpus* before the Supreme Court of the United States. The Supreme Court held that the petitioner was entitled to his discharge, because the Eleventh Amendment to the Constitution of the United States ousted the jurisdiction of the Circuit Court, and all its proceedings had in that case were void.

The following expressions are quoted from the opinion of the Court delivered by Mr. Justice Matthews:

"The question really is whether the Circuit Court had jurisdiction to entertain the suit in which that order was made, because the sole purpose and prayer of the bill was by final decree perpetually to enjoin the defendants from taking any steps in execution of the Act of May 12, 1887. The principal contention on the part of the petitioners is that the suit nominally against them is, in fact, and in law, a suit against the State of Virginia, whose officers they are, jurisdiction to entertain which is denied by the Eleventh Amendment to the Constitution, which declares that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens or subjects of any foreign State.' It must be regarded as the settled doctrine of this Court, established by its recent decisions, 'that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record.' *Poindexter v. Greenhow,* 114 U. S., 270, L. Ed., 29, 185. This is true, is not in harmony with what was said by Chief Justice Marshall in *Osborn v. Banks of U. S.*, 22 U. S., 9 Wheat., 738 (L. Ed., 6, 204). Ac-

cordingly, in *Cunningham v. Macon B. R. R.*, 139 U. S., 446, (L. Ed., 37, 992), it was decided that those cases where it is clearly seen upon the record that a State is an indispensable party to enable the Court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction.

The relief so sought is against the defendants, not in their individual, but in their representative capacity as officers of the State of Virginia. The acts sought to be restrained are the bringing of suits in the State of Virginia in their name and for their own use. If the State had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing that such a suit could be maintained—it would have been subject to the jurisdiction of the Court by a process served upon its Governor and Attorney-General, according to the proceedings in such cases. If a decree could have been rendered enjoining the State from bringing suit against its taxpayers, it would have operated upon the State only through the officers who by law are required to represent it in bringing such suits, namely, the person itself, its Attorney-General, and the Commonwealth's Attorney for the several counties. For a breach of such an injunction, these officers would be amenable to the Court as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and imprisonment. The nature of the case, as supposed, is identical with that the case is actually presented in the bill, with the single exception that the State is not named as a defendant. How else can the State be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, attorneys and agents? And if such officers, attorneys and agents are personally subject to the process of the Court, so as to forbid their acting in its behalf, how can it be said that the State itself is not subject to the jurisdiction of the Court as an actual and real defendant? It is, however, insisted upon in argument that it is within the jurisdiction of the Circuit Court of the United States to restrain by injunction officers of the State from executing the provisions of the State statutes, void by reason of repugnancy to the Constitution of the United States; that there are many precedents in which that jurisdiction has been exercised under the jurisdiction of this Court, and that the present case is covered by their authority."

The Court, after reviewing the authorities relied on in support of this position, held with the petitioner that it was a suit against the State, and that the proceeding against him for con-

tempt was null and void, and the petitioner was discharged. The language of the Court is:

"It is therefore within the prohibition of the Eleventh Amendment to the Constitution. *By the terms of that provision it is a case in which the judicial power of the United States does not extend.* The Circuit Court was *without jurisdiction* to entertain it. All the proceedings in the exercise of the jurisdiction which it assumed are null and void. The orders forbidding the petitioners to bring the suits, for bringing which they were adjudged in contempt of the authority, it had no power to make. The orders adjudging them in contempt were equally void, and their imprisonment is without authority of law."

FITTS v. McGHEE, 172 U. S., 416.

In that case McGhee and others had been appointed receivers of a railroad company, and they brought suit in the Circuit Court of the United States for the Northern District of Alabama, against the State of Alabama, William C. Oates, as Governor of the State of Alabama, and William C. Fittz, as Attorney-General of the State of Alabama, to enjoin the taking of any steps under a certain statute of Alabama fixing the tolls to be charged on a bridge across the Tennessee River, and providing penalties to be recovered by the parties who were required to pay rates in excess of those fixed by the statute, in case of violation, on the ground that the said statute was repugnant to the Federal Constitution, and the rates therein fixed were confiscatory.

Subsequently, the suit was dismissed as to the State of Alabama. It was alleged in the bill of complaint that the rates fixed by the act were arbitrary, unreasonable, and amounted virtually to the confiscation of the plaintiffs' property, and that the act was in violation of the Constitution of the United States, in that such legislative enactment deprived the owners of the bridge of their property without due process of law, and denied to them the equal protection of the law. It was further alleged that the clause in the act imposing a penalty for demanding or receiving a higher rate of toll than those prescribed was intended, and had the effect to deter the plaintiffs from questioning by legal proceedings the validity of such legislation, and that the plaintiffs

were remediless except by a bill in equity, seeking injunctive relief, restraining William C. Oates as Governor of the State of Alabama, William C. Fittz as Attorney-General of the State of Alabama, and all persons whomsoever from instituting any proceeding against the complainants, under the forfeiture clause of said act.

The defendants appeared specially for the purpose of moving, and did move, that the bill be dismissed upon the ground that the suit was one against the State, and prohibited by the Constitution of the United States.

The bill was then amended, by leave of Court, by adding to it, in effect, that frequent and numerous demands had been made of the toll gate keeper at the bridge, to pass persons at the rate of toll fixed by the act, and upon the refusal of the toll gate keeper to permit them to pass by upon the payment of the rates so fixed, and his requiring them to pay the rates of toll fixed by the plaintiffs, they had paid the toll so required of them under protest, and had threatened to institute suit or suits against the plaintiff under the penalty clause of the act, and had also threatened to procure proceedings to be instituted by the Governor and Attorney-General.

Special reference was made to William H. Gilliam, a private citizen of Alabama, as one of the parties or persons who had made threats of such suits and proceedings. The bill was amended by making Gilliam a party-defendant.

Subsequently an order was made, enjoining and restraining William C. Fittz, as Attorney General of the State of Alabama, and William H. Gilliam, and all persons whomsoever, from instituting or procuring the institution of any proceedings against the plaintiffs or either of them, by mandamus or otherwise.

At a later day the bill was again amended by alleging that at Fall Term, 1895, of the Circuit Court of Lauderdale County, Ala., a large number of indictments—some one hundred in number—were found by the Grand Jury of said court, against Thomas Clem and G. W. Brabson, who were the toll gate keepers at the public crossing of said bridge for the complainants.

These indictments were found under section 4151 of the criminal Code of Alabama, which makes it unlawful to demand,

take or receive any unreasonable charge or toll. The complainants alleged further in their amended bill that these indictments were found and prosecuted because the rates of toll which they had charged were the rates fixed by the receivers before the passage of the act reducing the tolls, which act was alleged to have been unconstitutional.

A. H. Carmichael, Solicitor for the Judicial District in which Lauderdale County is situated, was made a party defendant, and was enjoined.

Clem and Brabson, the agents who sold the tickets over the bridge in excess of the rate fixed by the statute, were arrested under the indictments in the State Court, and applied to the Circuit Court of the United States for writs of *habeas corpus.*

These are the material facts in that case.

The material facts in the case of *Southern Railway Company v. the Attorney General of North Carolina* are exactly similar. The two cases stand shoulder to shoulder, and they march together throughout step by step. The maximum rates fixed by the North Carolina rate went into force as did the Alabama rates by virtue of the Act of the Legislature itself. The only penalty prescribed by the act, or by any act, so far as the State is concerned, was that the agents who violate the law should be guilty of a misdemeanor. The punishment was left absolutely to the discretion of the courts. It might be a penny and the costs, or it might be a greater fine or imprisonment. The corporation was not made indictable. The penalties to be recovered by private persons, the State has no concern about, and no interest in. If it be said they are excessive, as was said in *Fittz v. McGhee,* and this be true, that part of the statute providing penalties in favor of private individuals may fail, as was said of the penalties in *Ragan v. Trust Company, supra,* and yet the remainder of the statute would stand unimpaired. The Attorney General in the Southern Railway case had no special duties to perform, but occupied the same position as the Attorney General in *Fitts v. McGhee.* The arrest of the appellee Wood was by reason of criminal proceedings in the State Court, just as in the case of Clem and Brabson.

It is thue that in the case of *Fittz v. McGhee* the Circuit Court declared the act complained of unconstitutional because the rates were confiscatory, and in that case the Solicitor, Carmichael, was enjoined from prosecuting any indictment against any one violating the provisions of that act. In those respects the case of *Fitts v. McGhee* differs from the case of *Southern Railway Company v. the Attorney General.*

The rates have never been declared even *prima facie* confiscatory, and the officers of the State Court causing the indictment and trying the appellee, Wood, have never been enjoined.

The interest of the State in *Fitts v. McGhee* was the interest that it had under the police power of the State, and surely the interest of the State of North Carolina in this case is the same.

This Court held by a unanimous opinion delivered by Mr. Justice Harlan, that the suit of *Fitts v. McGhee* was in effect a suit against the State, though the State was not by name a party, and that the Circuit Court of the United States had no jurisdiction to issue the injunction against the Attorney General or the Solicitor, and that the discharge of Clem and Brabson by the United States Circuit Judge was unlawful. It is said in the opinion in that case:

"The plaintiffs stated that the toll gatherers in their service had been indicted in a State Court for violating the provisions of the Act of 1895 with respect to tolls. Let them appear to the indictment and defend themselves upon the ground that the State statute is repugnant to the Constitution of the United States. The State Court is competent to determine the question thus raised and is under a duty to enforce the mandates of the supreme law of the land. *Robb v. Connally*, 111 U. S., 624. And if the question is determined adversely to the defendants in the highest court of the State in which the decision could be had, the judgment may be re-examined by this court upon writ of error. That the defendants may be frequently indicted constitutes no reason why a Federal Court of equity should assume to interfere with the ordinary course of criminal procedure in a State Court."

Speaking of the discharge of Clem and Brabson upon writs of *habeas corpus*, this Court said:

"It was error to discharge them and thereby interfere with their trial in the State Court. As already indicated, the Circuit Court, sitting in equity, was without jurisdiction to prohibit the institution and prosecution of these criminal proceedings in the State Courts."

Recognizing that there are the two classes of cases as indicated by me, the Court says further in that opinion:

"It is to be observed that neither the Attorney General of Alabama nor the Solicitor of the Eleventh Judicial Circuit for the State appears to have been charged below with any special duty in connection with the Act of February 9, 1895."

Answering the same argument that has been made here in behalf of the appellee, and distinguishing the cases relied upon by the appellee here from the case of *Fitts v. McGhee*, the Court in that opinion says:

"In support of the contention that the present suit is not one against the State, reference was made by counsel to several cases, among which were *Poindexter v. Greenhow*, 114 U. S., 270; *Allen v. Baltimore & O. R. Co.*, 114 U. S., 311; *Pennoyer v. McConnaughy*, 140 U. S., 1; *Re Tiler*, 149 U. S., 164; *Ragan v. Trust Company*, 154 U. S., 362; *Scott v. Donald*, 165 U. S., 58; *Smyth v. Ames*, 169 U. S., 466.

Upon examination it will be found that the defendants in those cases were officers of the State, specially charged with the execution of a State enactment alleged to be unconstitutional, but under the authority of which, it was averred, that they were committing, or were about to commit, some specific wrong, or trespass to the injury of the plaintiffs' rights. There is a wide difference between a suit against individuals holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing, by some positive act a wrong or trespass, and a suit against the officers of a State merely to contest the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State."

The argument on behalf of the appellee proceeds in absolute disregard of this distinction.

The question as to when a suit is against a sovereign has been considered by this Court in cases instituted against officers of

the United States, and it has been held "that the question as to whether a particular suit is one against the State within the meaning of the statute must depend upon the same principles that determine whether a particular suit is one against the United States. *Tindale v. Wesley*, 167 U. S., 216."

See also *U. S. v. Lee*, 195 U. S., 196; *Belknap v. Schield*, 164 U. S., 10; *Minnesota v. Hitchcock*, 185 U. S., 370; *Postal Supply Company v. Bruce*, 194 U. S., 601.

EVEN IF A STATE COURT HAS NOT JURISDICTION TO TRY THE PARTY CHARGED WITH CRIME, IN THIS CASE THE APPELLEE, WOOD, THE UNITED STATES JUDGES AND COURTS WILL NOT INTERFERE AND DISCHARGE THE PRISONER BY MEANS OF WRITS OF HABEAS CORPUS, EXCEPT UNDER CERTAIN CONDITIONS WHICH ARE UNUSUAL, AND THIS CASE DOES NOT COME WITHIN ANY OF THE EXCEPTIONS.

The Federal and State governments can never conflict in the administration of the law, unless one, or the other, acts without authority.

Each is supreme in its own sphere; the Federal government is supreme with respect to those matters and things which are granted to it by the States, in the Constitution of the United States.

The State governments are supreme with respect to all matters and things not granted by the Federal Constitution.

The Federal government is as powerless to lawfully trench upon the State, as the State government is powerless to trench upon the rights of the Federal government.

The Federal courts are as powerless to take cognizance of matters over which the State courts, under the law, have jurisdiction, as the State courts are powerless to issues processes and interfere with proceedings that are properly cognizable in the Federal courts.

There are expressions in some opinions of the Supreme Court of the United States, and also in some opinions of the Supreme

Courts of the various States, which may lead to confusion and misunderstanding, when segregated from other parts of the opinions and considered alone, but a proper analysis of all the opinions of the Supreme Court of the United States, on this question, when read in the light of the above well-recognized principle and distinction, will clarify the subject and avoid confusion.

The writ of *habeas corpus* can not be issued by a Federal judge in disregard of States' rights, and the writ of *habeas corpus* from a State judge can not issue in violation of the agreements between the States, contained in the Constitution of the United States.

This limitation upon the powers of the two governments, confining each to matters within its own proper sphere, in no way impairs the efficacy of the writ of *habeas corpus* guaranteed by the fundamental law.

What Judge, Federal or State, shall issue the writ of *habeas corpus,* and when will it issue and when be refused?

I shall undertake to sustain what I have said by extended quotations from, and analysis of, cases decided by the Supreme Court of the United States.

In *Robb v. Connolly,* 111 U. S., 624, a man by the name of Robb had been sent, as a commissioner, by the Governor of Oregon to the State of California, and in that State, upon the warrant of the Governor of California, he arrested one C. H. Bailey, a fugitive from justice from the State of Oregon, and was about to take his prisoner away, when a writ of *habeas corpus* was issued by a Judge of the Superior Court for the City and County of San Francisco, directing Robb to have his prisoner, the petitioner for the writ, before the Judge, and disclose the cause of his detention. Robb made return that he was acting under the laws of the United States providing for extradition of fugitives, and the warrant of the Governor of California, and that, therefore, the Superior Court of San Francisco had no jurisdiction, and Robb was thereupon attached for contempt; whereupon he sued out a writ of *habeas corpus* before the Supreme Court of California, and the writ was discharged, and the case went by writ of error to the Supreme Court of the United States, which sustained the ruling of the Supreme Court of California.

The opinion of the Supreme Court of the United States was delivered by Mr. Justice Harlan. He says, speaking for a unanimous Court, that it is always proper for response to be made to a writ of *habeas corpus*, but that where the writ was not properly issued, as when a State Judge issues a writ of *habeas corpus*, and thereby interferes with the administration of the law by the Federal Court, with respect to which the State Judge has no jurisdiction, that the person to whom the writ is addressed need not produce his prisoner. The Court in that case quotes from the case of *United States v. Booth*, 21 Howard, 513.

In that case the prisoner was held in custody by an officer of the United States in pursuance of a judgment of the Supreme Court of the United States, founded upon an indictment charging him with offense against the laws of the United States, and a writ of *habeas corpus* was issued by a Justice of the Supreme Court of the State.

The quotation is as follows:

"This right to inquire by process of *habeas corpus*, and the duty of the officer making a return, grows, necessarily, out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other."

"But, after the return is made and the State Judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus* nor any other process issued under State authority can pass over the line of division between the two sovereignties."

The Court there is speaking of the limitations upon the powers of the State Judge, because in that case the authority called into question was that of the State Judge who had issued the writ of *habeas corpus*. When the writ is issued by a Federal Judge it is just as true of him as of the State Judge, "that neither the writ of *habeas corpus*, nor any other process issued under *Federal* authority can pass over the line of division between the two sovereignties."

Mr. Justice Harlan uses this language in *Robb v. Connolly:*

"Underlying the entire argument in behalf of the plaintiff in error (Robb, the agent who refused to obey the orders of the State Judge upon a writ of *habeas corpus*) is the idea that the judicial tribunals of the States are excluded altogether from the consideration and determination of questions involving an authority or a right, privilege, or immunity, derived from the Constitution and laws of the United States. But this view is not sustained by the statutes defining and regulating the jurisdiction of the courts of the United States. In establishing those courts, Congress has taken care not to exclude the jurisdiction of the State courts from every case to which, by the Constitution, the judicial power of the United States extends."

In concluding the opinion in that case it is said:

"And, since the alleged fugitive was not, at the time the writ in question was issued, in the custody of the United States, by any of their tribunals or officers, the Court or Judge issuing it did not violate any right, privilege or immunity secured by the Constitution and laws of the United States, in requiring the production of the body of the fugitive upon the hearing of the return to the writ, to the end that he might be discharged if, upon the hearing, it was adjudged that his detention was unauthorized by the Act of Congress providing for the arrest and surrender of fugitives from justice or by the laws of the State in which he was found."

These propositions are established by the authorities:

First. That the writ from a Circuit Judge to a Sheriff can not properly require the production of a prisoner held by the Sheriff for violation of a State law, when the prisoner has had a trial with right to sue out a writ of error to the United States Supreme Court, or when he is about to be put upon his trial, if these facts appear upon the face of the petition, or upon the return of the Sheriff such are found to be the facts; in such case this ousts the jurisdiction of the Federal Judge who issued the writ, and he should so hold and discharge the writ. Whenever it appears that the prisoner is held by an officer of the State Court for a violation of the State law, and is not denied a hearing, the jurisdiction of the Federal Judge who issued the writ of *habeas corpus* is ousted, and the prisoner must make his application for his writ of *habeas corpus* to a State Court.

Second. This is so even though the guilt or innocense of the prisoner depends upon whether the State law is in conflict with the Federal Constitution, for this can be determined by the State Court, and finally by the Supreme Court of the United States.

In the case of *Ex parte* Crouch, 112 U. S., 178, application was made to the Supreme Court of the United States for a writ of *habeas corpus* to discharge the petitioner from custody by the State Court. Mr. Chief Justice Waite, delivering the opinion, said:

"The right of the petitioner to a writ of *habeas corpus* from this court is put, in the petition, upon the ground that the petitioner is detained in custody by the State Court in violation of the Constitution of the United States, because the statute which prohibits an officer from accepting the coupons impairs the obligation of the contract of the State to receive them, and is, on that account, inoperative and void by reason of the provision of the Constitution, which precludes the State from passing such laws."

In that case, the question was whether the petitioner was guilty of doing business as a sample merchant without paying a license tax, when he had tendered, before commencing business, to the proper revenue officers of the State, the amount of the required license tax in coupons cut from State bonds, which the State, when it issued the bonds, agreed should be receivable in payment of all State dues; when the officer refused to accept the tender because, by a statute enacted after the issuing of the bonds, the tax receiving officers were prohibited from taking the coupons for this tax.

It is further said in that opinion:

"It is elementary learning that, if a person is in the custody of a State Court of competent jurisdiction, not illegally asserted, he can not be taken from that jurisdiction and discharged on *habeas corpus* issued by a court of the United States, simply because he is not guilty of the offense for which he is held. All questions which may arise in the orderly course of the proceeding against him are to be determined by the Court to whose jurisdiction he has been subjected, and no other Court is au-

thorized to interfere to prevent it. Here the right of the prisoner to a discharge depends alone on the sufficiency of his defense to the information under which he is held. Whether his defense is sufficient or not is for the Court which tries him to determine. If in this determination errors are committed, they can only be corrected in an appropriate form or proceeding for that purpose. The office of a writ of *habeas corpus* is neither to correct such errors nor to take the prisoner away from the court which holds him for trial, for fear, if he remains, they will be committed."

Ex parte Fonda, 117 U. S., 516, was an application to the Supreme Court of the United States for leave to file petition for writ of *habeas corpus*. The petitioner had been sentenced by a State Court of Michigan, for a term in the penitentiary of that State, and was confined under the sentence. It was alleged that his imprisonment was illegal upon two grounds, one of which was that the petitioner was convicted, sentenced and imprisoned contrary to the Constitution of the United States and the laws of Congress.

Mr. Chief Justice Waite, delivering the opinion, says:

"No reason is suggested why the Supreme Court of the State may not review the judgment of the Circuit Court of the county, upon which the question is raised as to the application of the statute, under which the conviction has been had, to embezzlement by the servants and clerks of national banks; nor why it should not be permitted to do so without interference by the courts of the United States. The question appears to be one which, if properly presented by the record, may be reviewed in this court after a decision by the Supreme Court adverse to the petitioner."

In the case of *Ex parte Royall*, 117 U. S., 241, it was made to appear that there was a Virginia statute which made it unlawful to sell or collect coupons of certain Virginia bonds without paying a special license tax of $1,000, and, in addition, 20 per cent on the face value of each coupon. Royall sold a coupon without paying a special tax, and a bill of indictment was found against him by a grand jury in the State Court, and he was taken into custody of the Sergeant of Richmond to await trial.

Writs of *habeas corpus* were applied for and obtained from the United States Circuit Judge.

The Circuit Judge dismissed the petition, upon the ground that the Circuit Court was without jurisdiction to discharge the prisoner from custody. There was an appeal by the petitioner to the Supreme Court of the United States.

It is held by this Court that if the petition, upon its face, makes out a proper case, the writ should have issued to inquire into the cause of restraining the petitioner of his liberty, and that the case might be summarily heard and determined "as law and justice require."

In that case, the act was alleged to appear upon its face to be unconstitutional—in other words, the Circuit Judge was petitioned to inspect the statute and see whether it was in conflict with article 1, sec. 10 of the Constitution.

The rate law, in the case at bar, it is alleged, will appear, upon taking testimony, to be confiscatory, and therefore violative of the Fourteenth Amendment to the Constitution of the United States.

Some court should make that investigation. Shall it be the Judge upon a writ of *habeas corpus* or in any other manner, or shall it be the State Court, which is about to proceed with the trial? The last case cited is authority for the position taken by me, that the Circuit Judge has no jurisdiction to do more than inform himself as to how the petitioner is held, and then discharge the writ, if the State Court has jurisdiction to try the offense. The Federal Court is not permitted to substitute itself for the State Court to try the questions of fact, the determination of which is necessary to decide the question of the constitutionality of the act.

If the Circuit Judge can cause the prisoner to be brought before him, it is his duty to dismiss the petition, and remand the prisoner, even in a case like Royall's, and the case at bar is a stronger case for the State than that case.

It is said by Mr. Justice Harlan in that case:

"But it is not alleged and it does not appear in either case that he is unable to give security for his appearance in the State Courts, or that reasonable bail is denied him, or that his trial

will be unnecessarily delayed. The question as to the constitutionality of the law under which he is indicted must necessarily arise at the trial under the indictment, and is one upon which, as we have seen, it is competent for the State Court to pass."

Holding in that case that the Circuit Judge had discretion as to the time and mode of exerting its powers, the opinion says:

"That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."

Again it was there said:

"The Circuit Court was not at liberty, under the circumstances disclosed, to presume that the decision of the State Court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this Court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the Constitution and laws of the United States."

The writ was dismissed in Royall's case.

It was said in that case, however, that there were certain exceptional cases where the prisoner should be discharged.

First. Where the petitioner is in custody by State authority, for an act done, or omitted to be done, in pursuance of a law of the United States, or of an order, process, or a decree of a court or Judge thereof.

Second. When a subject or citizen of a foreign State, and domiciled therein, is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign State under color thereof, the validity or effect whereof depends upon the law of nations.

Third. In such and like cases of urgency involving the authority and operation of the general government or the obligations of this country to, or its relations with, foreign nations.

Fourth. When a person is in custody of a State court and is needed as a witness in a Federal court, he may be taken by *habeas corpus,* but, of course, not discharged.

This case comes under none of the exceptions.

It can not reasonably be contended that the petitioner in this case is protected by reason of any order or decree of a Federal court, for the reason, first, that the complainant, the Southern Railway Company, and its agents are not enjoined from selling tickets at 2¼ cents. The Southern Railway Company can not evade responsibility by going into the United States Circuit Court and procuring an injunction against others.

In the second place, the injunction issued by the Circuit Court was in a case where it had and could have no jurisdiction of the subject matter, and its decree was a nullity.

The petitioner Royall, in *Ex Parte Royall, supra,* also filed an application before the Supreme Court of the United States for a writ of *habeas corpus,* upon the grounds as stated in his petition, that the statute under which he was arrested and held in custody was repugnant to the Constitution of the United States; and, consequently, that he is restrained of his liberty in violation of that instrument. The petition states the same facts as are set out in the case of *Ex Parte Royall* above referred to.

The case here referred to is reported in 117 U. S., 255.

Mr. Justice Harlan, delivering the opinion of the Court in that case, says:

"The application for the writ must be denied. It is sufficient to say that if this Court has power, under existing legislation and upon *habeas corpus,* to discharge the petitioner, who is in custody under the process of a State Court of original jurisdiction, for trial on an indictment charging him with offense against the laws of that State—upon which it is not necessary to express an opinion—such power ought not, for the reasons given in the other cases just decided, to be exercised in advance of his trial."

In re Thomas H. Harding, a petition for writ of *habeas corpus* before the United States Supreme Court, 120 U. S., 782, Chief Justice Waite, delivering the opinion of the Court, said:

"This Court has no jurisdiction for the discharge on *habeas corpus* by a person in prison under sentence of the Territorial

Court in a criminal case, unless the sentence exceeds the jurisdiction of that Court, or there is no authority to hold him under the sentence."

Ex Parte Ayres, 123 U. S., 443, is a leading and important case in point.

The case of *State of New York v. Eno,* 155 U. S., 90, was one in which Eno, an officer of a National Bank, was indicted for forgery under the law of the State of New York. He sued out a writ of *habeas corpus* before the Circuit Court of the United States for the Southern District of New York, and was discharged from custody. The ground for his application for the writ of *habeas corpus* was that the State of New York had no jurisdiction to try him for forgery as an officer of a National Bank. The Supreme Court of the United States reversed the order of the Circuit Judge, and directed that the writ of *habeas corpus* be dismissed and that Eno be remanded to the custody of the proper State authorities. The grounds for this ruling were that the questions presented by the writ of *habeas corpus* should have been tried in the State Court, and presented, if desired, to the Supreme Court of the United States, by writ of error. In delivering the opinion of the Court Mr. Justice Harlan used language as follows:

"'We can not suppose,' the Court said (referring to what was said by the Supreme Court of the United States in *Ex Parte Royall,* 117 U. S., 241), 'that Congress intended to compel those courts by such means to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State Courts exercising authority within the same territorial limits where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily and thereupon dispose of the party as law and justice require does not deprive the Court of discretion as to the time and mode in which it will exert the powers conferred upon it."

(What is meant by the "discretion" of the courts of the United State to issue writs of *habeas corpus* for parties in custody under authority of the State Courts, as this term is used in *Ex Parte Royall, supra,* will be explained by the fact that the

Supreme Court of the United States in Eno's case overruled the Circuit Judge in granting the writ of *habeas corpus*, and from the following language which immediately succeeds that last above quoted.)

"That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."

It may be well to refer to case of *Thomas v. Loney*, 134 U. S., 372. It will be observed that this court in Ex Parte Royall recognized certain cases as constituting exceptions to the general rule among which are cases of urgency, involving the authority and operation of the general government. Loney's case was of that class. (Loney was indicted in a State Court for an alleged false oath made before a Notary Public taking testimony in a contested congressional election case.) The Supreme Court of the United States held that the public interest required that he should not be held by the State Court, which had no jurisdiction to try him for the offense.

The Court concluded the opinion in Eno's case as follows:

"After considering the merits of the several questions discussed by counsel, we are of opinion that the Circuit Court erred in granting the prayer of the accused. He should not have been discharged from the custody of the State authorities, especially as he does not appear to have been under indictment in any court of the United States for the offenses alleged to have been committed by him."

In the case of *Pepke v. Cronan*, 155 U. S., 98 (Lawyers' Ed. 39, 84), Pepke had been prosecuted under the law of the State of Connecticut. He had violated an order of the Court made in that case, alleging that the law under which the proceeding had been had was in contravention of the Constitution of the United States, and the judgment against him, therefore, void. A writ

of *habeas corpus* was issued, and upon hearing was discharged, and Pepke appealed to the Supreme Court of the United States.

Mr. Chief Justice Fuller, delivering the opinion of the Court, said:

"It is insisted upon the argument that the judgment in contempt was not appealable, but it was conceded that the validity of the law and of the sentence could be tested by the Supreme Court of the State on *certiorari* or *habeas corpus*, and no reason was suggested why, if the judgment of the District Judge was the final judgment of the highest court of the State in which a decision in the matter could be had, a writ of error to this court might not be applied for. After considering the merits of the questions discussed, the judgment must be affirmed upon the authority of *Ex Parte Fonda*, 117 U. S., 516; *Wood v. Bruch*, 140 U. S., 278; *Cook v. Hart*, 146 U. S., 183; *New York v. Eno*, 155 U. S., 80."

In the case of *Andrews v. Swartz*, 156 U. S., 273, the appellant had been convicted of a criminal offense in the State Courts of New Jersey, and while in custody under sentence, he applied to the Circuit Court of the United States for the district of New Jersey for a writ of *habeas corpus*, which was denied; whereupon he appealed to the Supreme Court of the United States and the action of the Circuit Court was affirmed.

Mr. Justice Harlan, delivering the opinion of the Court, said in part:

"If the State Court, having entered upon the trial of the case, committed error in the conduct of the trial to the prejudice of the accused, his proper remedy was, after the final judgment of conviction, to carry the case to the highest court of the State having jurisdiction to review that judgment, then upon a writ of error to this court, if the final judgment of such State Court denied any right, privilege or immunity specially claimed or which was secured to him by the Constitution of the United States."

The case of *Bergemann v. Backer*, 157 U. S., 655, was also a case in which the appellant, after having been convicted of a criminal offense by the State Courts of New Jersey, in violation, as he alleged, of the 14th Amendment to the Constitution of the

United States, applied to the Circuit Court of the United States for a writ of *habeas corpus*, and this being denied, appealed to the Supreme Court of the United States.

Mr. Justice Harlan, delivering the opinion of the Court, held that his proper remedy was by writ of error, and not by writ of *habeas corpus*, and affirmed the ruling of the Circuit Court.

In the case of *Ex Parte Belt*, 159 U. S., 97, an application was made to the Supreme Court of the United States by the petitioner for a writ of *habeas corpus*, upon the ground that he was held in custody under sentence of the Supreme Court of the District of Columbia, rendered in violation of some of the provisions of the Constitution of the United States.

Mr. Chief Justice Fuller, in delivering the opinion of the Court, said:

"The general rule is that the writ of *habeas curpus* will not issue unless the Court under whose warrant the petitioner is held is without jurisdiction, and it can not be used to correct errors. Ordinarily the writ will not lie where there is a remedy by writ of error or appeal; but in rare and exceptional cases it may be issued, although such remedy exists."

(These exceptional cases were specified in *Ex Parte Royall*, and are set out above.)

In *Whitten v. Tomlinson*, 160 U. S., 234, the appellant filed a petition in the Circuit Court of the United States for the District of Connecticut for writ of *habeas corpus*, to be addressed to the Sheriff of the County of New Haven in the State of Connecticut, alleging that he was unlawfully restrained of his liberty in violation of the Constitution of the United States. His application for the writ was denied, and upon appeal by him to the Supreme Court of the United States the order of the Circuit Court denying the writ was affirmed.

The opinion of the Court concludes as follows:

"There could be no better illustration than this case affords of the wisdom, if not necessity, of the rule established by the decisions of this Court, above cited, that a prisoner in custody under authority of a State should not, except in a case of peculiar urgency, be discharged by a court or Judge of the United States,

upon a writ of *habeas corpus*, in advance of any proceedings in the courts of the State to test the validity of his arrest and detention. The adoption of a different rule would, undoubtedly, interfere with the exercise of the criminal jurisdiction of the several States, and with the performance by this Court of its appropriate duties."

The Court in delivering the opinion in that case refers to the case of *Cunningham v. Nagle*, 135 U. S., where Nagle was charged with the duty of guarding the person of a United States Judge, and in performing this duty killed a man, and was arrested by the authorities of the State in which the killing occurred.

The Court also refers to the cases of *Thomas v. Loney*, 134 U. S., 372, where Loney was arrested by a State magistrate for false swearing in a congressional contested election case.

Also to the case of *Mali v. Hudson County Jail Keeper* ("Wildenhus's case"), 120 U. S., in which the prisoner was arrested by the State authorities for an offense committed while one of a crew of a foreign merchant vessel while on board the vessel in a port in the State, and when the arrest was alleged to be contrary to a treaty between the United States and a foreign country.

After referring to these cases, the Court said:

"But except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by *habeas corpus* in advance of a final determination of his case in the courts of the State, and even after such determination in those courts, will generally leave the prisoner to the usual and orderly course of proceeding by writ of error from this Court."

In the case of *Markuson v. Boucher*, 175 U. S., 184, the petitioner was indicted and sentenced in the State court, and being in custody sued out a writ of *habeas corpus* before a United States Judge, alleging that his imprisonment was in violation of the Fourteenth Amendment to the Constitution of the United States, and of other provisions of the Constitution. The writ of *habeas corpus*, after having been issued, was discharged, and the prisoner was remanded to the custody of the State authorities.

On appeal to the Supreme Court of the United States, Mr. Justice McKenna, delivering the opinion of the Court, said in part:

"We have frequently pronounced against the review by *habeas corpus* of the judgment of the State courts in criminal cases, because some right under the Constitution of the United States was alleged to have been denied the person convicted, and have repeatedly decided the proper remedy was by writ of error. It is not necessary to review the cases or to repeat or justify their reasonings. We lately stated the rule and the reasons for it in the case of *Baker v. Grice*, 169 U. S., 284, 42 L. Ed., 748, and *Tinsley v. Anderson*, 171 U. S., 101, 43 L. Ed., 91. In the latter passing on an appeal from judgment dismissing a writ of *habeas corpus*, the Chief Justice said: 'The dismissal by the Circuit Court of its own writ of *habeas corpus* was in accordance with the rule, repeatedly laid down by this Court, that the Circuit Courts of the United States, while they have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint of liberty of any person in custody under the authority of a State in violation of the Constitution, a law or treaty of the United States, yet except in cases of peculiar urgency, ought not to exercise that jurisdiction by a discharge of the person in advance of a final determination of his case in the courts of the State, and, even after such final determination, will leave him to his remedy to review it by writ of error to this Court. *Ex Parte Royall*, 117 U. S., 241; *Ex Parte Fonday*, 117 U. S., 516; *Re Frederick*, 149 U. S., 70; *Pepke v. Cronan*, 155 U. S., 100; *Bergeman v. Backer*, 157 U. S., 655; *Whitten v. Tomlinson*, 160 U. S., 40; *Baker v. Grice*, 169 U. S., 284.' In *Baker v. Grice*, Mr. Justice Peckham said: 'Instead of discharging, they (the Federal courts) will leave the prisoner to be dealt with by the courts of the State; that after a final determination of the case by the State Court, the Federal courts will even then generally leave the petitioner to his remedy by writ of error from this Court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal Court by which a person under an indictment in a State Court and subject to its laws, may, by a decision of a single Judge of the Federal Court upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the State courts of an indictment found under the laws of the State be finally prevented.'"

The case of *Minnesota v. Brundage*, 180 U. S., 499, was a proceeding which originated in the State Court of Minnesota, under an indictment against Brundage for selling oleomargarine.

The defendant, upon being arrested, alleged that he was restrained of his liberty in violation of the Constitution of the United States, and sued out a writ of *habeas corpus* before a Judge of the Circuit Court of the United States, and the prisoner was discharged.

Mr. Justice Harlan, delivering the opinion of the Court, said:

"The State insists, upon the appeal, that the statute, at least in the particulars applicable to this case, was consistent with the Constitution of the United States. This question is one of great importance, but we do not deem it necessary now to consider it; for, in our opinion, the Circuit Court should have denied the application for the writ of *habeas corpus*, without prejudice to renewal of the same after the accused had availed himself of such remedies as the law of the State afforded for the review of the judgment of the State courts of which he complains."

And again:

"The present case does not come within any of the exceptions to the general rule announced in the case above cited. It is not, in any *legal view*, one of urgency. The accused does not, in his application, state any reason why he should not be required to bring the question involved in the prosecution against him before a higher court of the State and invoke its power to discharge him, if in its judgment he is restrained of his liberty in violation of the Constitution of the United States. It can not be assumed that the State Court will hesitate to enforce any rights secured to him by that instrument; for upon them equally with the courts of the Union rests the duty of maintaining the supreme law of the land."

And again it is said in that opinion:

"Among the cases cited in support of the action of the Circuit Court was *Minnesota v. Barber*, 136 U. S., 313, 34 L. Ed., 455, and *Plumley v. Mass.*, 155 U. S., 461, 39 L. Ed., 223. It must be admitted that in the first named case the general rule announced in prior an subsequent cases was not applied. The reasons for not applying it do not appear from the opinion of the Court. It may be that the precise point now under examination was not called to its attention. *Plumley v. Mass.* is not in point, for it came to this Court upon writ of error to the highest Court of Massachusetts."

And again it is there said:

"We do not think that the exercise by a Federal Court of its powers upon *habeas corpus* to discharge one held in custody by the State authorities and charged with a violation of the State enactment, should be materially controlled by any consideration of the extent of particular business interests that may be affected by a prosecution instituted in a State tribunal against him, or by the indirect effect of his detention in custody upon the rights of the general public."

The case of *Storti v. Massachusetts*, 183 U. S., 46 L. Ed., 120, was one in which there had been conviction in the State Court and a petition for a writ of *habeas corpus* filed before the Circuit Court of the United States for the District of Massachusetts, alleging that the petitioner was restrained of his liberty in violation of the Fourteenth Amendment to the Constitution of the United States, and also contrary to the Third Article of the treaty between the United States and the King of Italy. The Circuit Court discharged the writ of *habeas corpus*, and the Supreme Court of the United States on appeal in an opinion delivered by Mr. Justice Brewer, affirmed the judgment and said in part:

"It is an attempt to substitute a writ of *habeas corpus* for a writ of error, and to review the proceedings in a criminal case in the State Court, by such collateral attack rather than by direct proceedings in error—something which this Court has repeatedly said ought seldom to be done."

In the case of *Reid v. Jones*, 187 U. S., 151 (47 L. Ed., 116), the appellant Reid had been convicted and sentenced for transporting cattle in violation of a statute of Colorado, enacted for the protection of cattle in that State against disease. The appellant claimed that he was restrained of his liberty in violation of a provision of the Constitution of the United States giving to Congress full control over interstate commerce.

The Circuit Court of the United States dismissed the application for the writ of *habeas corpus*, and Reid appealed to the Supreme Court of the United States.

Mr. Justice Harlan, delivering the opinion of that Court, said:

"The merits of this case have been fully considered in Case Number 269 (*Reid v. Colorado*, 187 U. S., 137), but if this had

not been, we should dismiss the present appeal; for one convicted in a State Court for an alleged violation of the criminal statutes of the State, and who contends that he is held in violation of the Constitution of the United States, must, ordinarily, first take his case to the highest court of the State in which the judgment could be reviewed, and thence bring it, if unsuccessful there, to this Court by writ of error; that only in certain exceptional cases, of which the present is not one, will a Circuit Court of the United States, or this Court, upon an appeal from a Circuit Court, intervene by writ of *habeas corpus* in advance of the final action by the highest court of the State."

In the case of *Riggins v. United States*, 199 U. S., 547, Mr. Chief Justice Fuller used this language in the opinion of the Court:

"It is settled that the writ of *habeas corpus* will not issue unless the Court under whose warrant the petitioner is held is without jurisdiction, and that it can not be used merely to correct errors. Ordinarily the writ will not be granted when there is a remedy by writ of error or appeal, yet, in rare and exceptional cases, it may be issued, although such remedy exist."

Again it is there said:

"There is nothing in this record to disclose that there were any special circumstances which justified a departure from the regular course of judicial procedure. That departure is contrary to the views we have heretofore explicitly expressed, and, if we acquiesce in this method of invoking our jurisdiction, we shall find ourselves obligated to decide questions in advance of final adjudication, contrary to the settled rule, and to many decisions we have heretofore announced upon the subject."

In the case of *Urquhart v. Brown*, decided by this court on March 7, 1907, and reported in 205, U. S., 179, the opinion of the Court being delivered by Mr. Justice Harlan, it is said:

"The exceptional case in which a Federal Court or Judge may sometimes appropriately interfere by *habeas corpus* in advance of final action by the authorities of the State are those of great urgency that require to be promptly disposed of; such, for instance, as the cases involving the authority of the operations of the general government, or the obligations of this coun-

try to, or its relations with, foreign nations. The present case is not within any of the exceptions recognized in our former decisions. If the applicant felt that the decision upon *habeas corpus* in the Circuit Court of the State was in violation of his rights under the Constitution or Laws of the United States, he could have brought the case by writ of error directly from that court to this court.

This recent decision of this Court is an authority against the action of his Honor, Circuit Judge Pritchard, in discharging the appellee Wood from the custody of the State officials.

In view of this long line of authorities, which clearly show that the Supreme Court of the United States has undertaken to lay down and adhere to fixed rules, with reference to the issuing of writs of *habeas corpus* by Federal Courts to discharge the prisoners from the custody of State Courts, it would seem that the only ground for a controversy in the case at bar is, as to whether it comes within the exceptions to the general rule, that the writ of *habeas corpus* will not be substituted for a writ of error. In many of the cases it is said that the writ should not have been issued by the Federal Judge, because there were no special circumstances which justified it. What are special circumstances within the meaning of the term, as used by the Supreme Court of the United States, is definitely laid down, first in the case of *Ex Parte Royall*, 117 U. S., 247, as exceptions to the general rule. These exceptions are often repeated in cases subsequent to Royall's case, and they are in substance heretofore set out in this brief.

That a case like the one at bar does not come within any of the exceptions, and is not a case of unusual circumstances, justifying the issuance of the writ of *habeas corpus* is, in effect, definitely decided in the case of *Fitts v. McGee*, 172 U. S., 516.

It was alleged by the complainants in that suit that the clause in the act imposing penalties for demanding and receiving higher rates of toll than those prescribed, was intended, and had the effect to deter the plaintiffs from questioning by legal proceedings, the validity of such legislation. Certain parties who had made threats to institute suits and proceedings for penalties for making excessive charges, were made parties to the suit, and

A. H. Carmichael, a Solicitor for one of the judicial districts of the State of Alabama, was subsequently made a party to that suit.

Subsequently, in an amendment to the bill, it was alleged that, after the commencement of the suit in equity, the agents of the bridge company who had collected tolls for it had at the Fall Term, 1895, of the Circuit Court of Lauderdale County, Alabama, been indicted in a large number of cases,—some one hundred in number—by the grand jury, by virtue of a statute of the State of Alabama providing that any person being an officer, or agent, servant or employee of any incorporated road or bridge company, who takes, receives, or demands any greater charge or toll for travel, or passage, over such road or bridge, than is authorized, shall be guilty of a crime. It was alleged that writs of arrest had issued to the Sheriff of the county, and that he had arrested two of the agents of the bridge company, Clem and Brabson, and that such proceedings were in contempt of the order of the Court, which had appointed the receivers, and was in violation of an injunction which the Circuit Court had issued in the suit brought by the receivers, and which still remained in force, "enjoining the said Governor, Attorney General, and all persons whomsoever from instituting any suits and proceedings" under the above statute of the State.

The suit was dismissed by the complainants as to the State.

The cause was heard, upon a motion by the Governor and Attorney General, to dismiss the bill, upon the ground that the suit was one against the State, in violation of the Constitution of the United States.

Clem and Brabson sued out writs of *habeas corpus*, and were released by the United States Circuit Judge, each on his own recognizance in the sum of $150, conditioned that they would appear in court from day to day until discharged. Various proceedings were had before a final decree was found, but when it was rendered, it was considered that the complainants were entitled to the relief sought, and that the act was violative of the constitutional rights of the owners of the bridge, and of the complainants. This was reversed upon appeal to the Supreme Court of the United States.

Mr. Justice Harlan, delivering the opinion of the Court, used this language:

"There were no exceptional or extraordinary circumstances in these cases to have justified the interference by the Circuit Court, under writs of *habeas corpus*, with the trial of the indictments found in the State Courts."

There is no material circumstance in the case at bar that did not exist in the case just cited, except that the Solicitors for the State are not made parties.

Respectfully submitted,

E. J. JUSTICE,
Of Attorney for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 474.

THOMAS F. HUNTER, SHERIFF OF BUNCOMBE COUNTY, NORTH CAROLINA, APPELLANT,

versus

JAMES H. WOOD, APPELLEE.

SUPPLEMENTAL BRIEF FOR APPELLANT

C. B. AYCOCK,
Of Counsel.

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I desire to file the following supplemental brief:

In the first place, the appellant contends that the Circuit Court of the United States was without jurisdiction for the reason that under Maximum Passenger Rate Act, ratified on the 2d day of March, 1907, the defendant Corporation Commissioners and the Attorney-General and the Assistant Attorney-General were without any duties to perform in relation to the enforcement of said act. The act in question marked a new movement on the part of the State of North Carolina. For many years it had built up a body of laws relating to railroad conduct and management within the State, and had put these laws relating to railroad conduct within the control and enforcement of the Corporation Commissioners and the Attorney-General. For some reason the Legislature concluded, so far as passenger rates were concerned, to take these directly in hand. This departure is made clear by reference to the Freight Rate Act passed at the same session. That act provides for certain duties to be performed by the Corporation Commission and the Attorney-General. The Legislature recognized the inherent difficulties of dealing with freight tariffs, but it found no such trouble in reference to passenger rates, and undertook to deal

with these directly. It was the unquestioned purpose of the Legislature to take this matter entirely into its own hands. This view has been taken by the Supreme Court of North Carolina in the case of *State v. Southern Railway Company*, reported in the Southeastern Reporter, vol. 59, No. 6, December 21, 1907, at page 570.

Counsel for appellee have cited in their brief many sections from The Revisal of North Carolina relating to the duties of the Corporation Commission and the Attorney-General, and seek to make them applicable to the Passenger Rate Act under discussion. It is their effort to show that this act is a part of the system, one of a series or group, and thereby to find support for their contention that the Circuit Court had jurisdiction. This deduction would be fair and natural if it were not manifest from the whole history of legislation upon the subject in North Carolina that the Legislature intended to make a distinct departure from its settled policy and itself to control the passenger rates.

"Although the statute under consideration may be one of a series or group, it may be that the Legislature designs to depart from the general policy or provision of enactments on the general subject; and if such a design is unmistakably apparent on the face of the act it must be given effect."

Black on Interpretation of Laws, page 209.

This purpose of the Legislature may be made clear by reference to an allegation made by the Southern Railway in its bill in the Circuit Court, wherein it alleges that the 3¼ cents per mile for first-class and 2¾ cents per mile for second-class rates were fixed by the Corporation Commission, and were deemed by said Commission to be just and reasonable. If this allegation be taken to be true, it may furnish a sufficient reason for the legislative interference and for taking the matter away from the Corporation Commission; and moreover, it is strongly illustrative of the danger of allowing the Circuit Court to assume jurisdiction in the premises. Suppose the State, acting through her Legislature was convinced by an examination of the reports of the railroad that the rates in force were too high, and was

also convinced by non-action on the part of the Corporation Commission that it would not interfere to lower said rates, can it be possible that legislative action can be stopped in a suit by a railroad company against the Commission, the railroad company alleging that the legislative rates was too low and the Corporation Commission admitting it, and this in spite of the action of the Legislature, which alone has jurisdiction to pass laws for the State? It seems to me to state this proposition is to answer it. The Legislature in passing the act under discussion undertook to fix the rates itself and to make them effective. It made the act dependent upon no one else. It was to go into effect on July 1st without regard to action on the part of anybody. The provision that the Corporation Commission shall publish the rates fixed by this act for the several railroads operating in the State on or before the first day of July, 1907, is put into the act in order that the public may have knowledge of the rates in force on the various railroads in the State—every railroad corporation itself knows whether its mileage is sixty miles or under, and whether it had been constructed within the twelve months preceding the first day of January, 1907. The act provides its own punishments and penalties. *The punishments and penalties provided in the act differ from and are inconsistent with those provided in the general laws.*

Section 1086 of the Revisal provides that the railroads shall have thirty days in which to make good any injury done by it in violation of the rules and regulations provided and prescribed by the Corporation Commission, and if after such notice it does not make ample and full recompense for the wrong done it shall incur a penalty for each offense of $500.

In the act under consideration the penalty attaches without any notice and can not be remedied by the railroad companies complying with the request of the Corporation Commission to pay the difference between the rate charged and the rate permitted by law.

Section 1087 provides that the penalty of $500 for failure to obey any rule, order or regulation of the Corporation Commission shall be recovered in the Superior Court of Wake County

in the name of the State on the relation of the Corporation Commission, and each day's violation is made a separate offense.

Does the defendant insist that the penalties provided in these two sections are in force if the act under discussion is constitutional?

Are the penalties provided in the act in addition to these penalties, or do the penalties and punishments provided in the Maximum Rate Act take the place of those provided in the general law?

Section 1092 provides that the penalty to be recovered shall be in the county where it has been incurred, but the suit to recover it shall be instituted in the name of the State of North Carolina on the relation of the Corporation Commission, and shall be instituted by the Attorney-General or the Solicitor of the judicial district in which such penalty has been incurred. Are the penalties in that section a part of the present law in relation to the enforcement of passenger rates?

Section 1099 provides that the Commission shall make reasonable and just rates.

Section 1104 shows what they shall consider in order to arrive at the making of reasonable and just rates. Can it be contended for a moment that the Legislature intended for the Corportion Commission to make reasonable and just rates and to consider all things essential to determine these reasonable and just rates so as to fix the rate at less than 2 1-4 cents, but with no power to raise it beyond that sum if it should turn out as the defendant in this case alleged in its bill of complaint in the Circuit Court that it can not live on its present charges? Is it not manifest, on the other hand, that the Legislature, having looked into the question and being satisfied that the defendant could live at the rate prescribed, determined to take the matter in its own hands and fix the rate absolutely without the power on the part of the Corporation Commission to lower or raise it, but still leaving to the railroad itself the power to reduce it below 2 1-4 cents if it sees fit.

Section 1106 provides that the Commission shall, from time to time, and as often as circumstances may require, change and revise or cause to be changed or revised any schedules or rates

fixed by the Commission or allowed to be charged by any carrier of freight, passenger or express, or by any telegraph or telephone company. Is it possible to believe that the Commission could change this rate downward and not upward, if the circumstances should require the change to be made upward? Is not the conclusion inevitable that the Legislature intended to take the whole matter into its own hands in so far as passenger rates are concerned?

In the same way it is apparent that section 1066 gives to the Corporation Commission general control and supervision of all railroads necessary to carry into effect the provisions of law, except that it shall not have any power with reference to the fixing or enforcing of passenger rates. To put any other construction upon the act in question is to overturn the manifest intention of the Legislature in order to carry out a rule that repeals by implication are not favored. If the Corporation Commission should, upon investigation, find that the legal rate now in force of 2 1-4 cents was too high and ought to be reduced to 2 cents, and seek to put said rate into effect and to enforce the penalties provided in the general law, and to this end should invite the aid of the Attorney-General and the Assistant Attorney-General to enforce the penalties, the question raised would be presented in its clearest form and there can be no doubt that the Court would hold that the Corporation Commission and the Attorney-General have by reason of the new law no power over the passenger rate and no duty to enforce the same. This construction is unconsciously sustained by the defendant's averment in paragraph 17 of its bill of complaint in the Circuit Court, wherein it alleges that the defendants in said suit will, in case it exercises its constitutional right to make charges in excess of the rate fixed by said act, proceed against it for violation thereof, and will in such case proceed to impose the penalties "prescribed by said act." This construction of the passenger rate statute is strengthened by the fact that the freight rate statute deals with the reduction of freight rates in a different fashion.

Section 1 of that act, which was ratified the 9th day of March, 1907, provides that the Corporation Commission is hereby em-

powered to reduce said local rate whenever in its opinion, and after invistigation by it, it shall determine that a lower rate is reasonable. A like provision nowhere appears in the act affecting passenger rates. Its absence is significant. The Legislature intended the Passenger Rate Act to go into effect on the date named in it and to be enforced by indictment and by the penalties prescribed in said act. The reason for doing this is apparent. The Legislature was not unmindful of what was said in *St. Louis and S. F. R. Co. v. Gill,* 156 U. S., 664. "Sometimes in acting on this subject the State Legislatures have created commissions or boards of public works with power to establish rates for the transportation of passengers and freights, and in such instances the course recommended by Mr. Justice Miller may well be followed; that the remedy for a tariff alleged to be unreasonable should be sought in a bill of equity or some equivalent proceeding wherein the rights of the public as well as those of the company complaining can be protected. But there are other cases and the present is one, where the Legislatures choose to act directly on the subject by themselves establishing a tariff of rates and prescribing penalties. In such cases there is no opportunity to resort to a compendious remedy such as a bill in equity, because there is no public functionary or commission which could be made to respond, and, therefore, if the companies are to have any relief it must be found in the right to raise the question of reasonableness of the statutory rates by way of defense to an action for the collection of the penalties."

McChord v. L. & N. R. R., 183 U. S., 484.

2. But even if the Circuit Court had jurisdiction over the subject-matter, and the parties, it could not restrain the State from proceeding to enforce her criminal laws.

Counsel for appellee in their briefs, in an effort to meet this point, undertake to show that the act under consideration is unconstitutional and that it takes the property of the road without due process of law, denies it the equal protection of the law, and otherwise offends against the Fourteenth Amendment. Even if the act were unconstitutional this would not confer jurisdiction upon the Circuit Court.

The Circuit Court can not without necessary parties determine the question as to whether any particular statute is objectionable to the provisions of the Fourteenth Amendment. The State can not be directly reached. If any statute is passed which is forbidden by the Fourteenth Amendment, whenever such statute is attempted to be enforced then it becomes the duty of the Court, which is asked to enforce the statute, to declare it void. If no effort is made to enforce it there is no power anywhere to declare the act void, except in those instances where particular persons are charged with the duty of enforcing the statute, and in doing so are about to commit some trespass against the person or property of the complainant. To hold otherwise is to hold up for examination by the Courts of the United States every police regulation of the various States. It is not to be presumed that the Legislatures are going to take property without due process of law, or to deny the equal protection of the law. On the contrary, it is not to be forgotten that it is as much the duty of the Legislatures to obey the Constitution of the United States as it is the duty of the Courts.

The Southern Railway is a Virginia corporation doing intrastate business within North Carolina, not of right but by comity. If it can defy the will of the State and hold up the execution of the State's laws until they shall have been pronounced constitutional, then the State becomes powerless to enforce her other police regulations. Laws passed against the unlawful manufacture and sale of liquor, against the destruction of child life in textile and other factories and pure food laws designed to protect the citizens against fraud and injury, will all alike have to await the determination of the Circuit Court of the United States before the State can proceed to enforce them. Whenever the power which is specially charged with the enforcement of the police authority is thus humiliated, lawlessness will not await the coming of the night, but will stalk the land in broad daytime. This result is sought to be justified on the plea of necessity, and this plea is based upon the assumption that the State Legislatures are violent antagonists of property rights. The Constitution assumes no such thing. The Supreme Court of the United States has repeatedly deprecated any such idea. It never has

occurred in the history of legislation in this country that the rates fixed by the Legislature were so outrageously low as to show bad faith and an utter disregard of constitutional restrictions. Some of them have been too low, and for them an adequate remedy can be found in the courts whenever the statutes fixing such rates are attempted to be enforced. Indeed an appeal to the court of equity appears to me to be more hazardous than obedience to the statute. If the rate is confiscatory the railroad knows it. It has in its possession all the data upon which rates are based. It has full knowledge of capitalization, of gross income, of operating expenses, and has the fullest knowledge of all the facts which go in the formation of an opinion as to the probable income of the future. If the statute is confiscatory it can safely disobey it; for it is a presumption that this fact would be found by any court that tried it. If, on the other hand, the statute is not confiscatory, then the intervention of the court of equity may mean destruction to the road, for it can not be successfully contended in this case, if the case pending in the Circuit Court shall finally reach the Supreme Court of the United States, and the statute shall be declared constitutional because the rate is not confiscatory, that the statute has not been law from July 1, 1907, and if it is law then the State can assuredly indict the agents and servants, and individuals can bring suits for penalties against the railroad for every violation occurring during the pendency of the injunction in the Circuit Court. If this be not true, then we have seen not an *unconstitutional act*, but a *constitutional* LAW made of no effect. I have always understood that the power to suspend *law* rests with the representatives of the people. If the Circuit Court has jurisdiction in this case and can restrain the State from prosecuting during the pendency of the case and can prevent the State from prosecuting after the ending of the case in favor of the State, then the authority of the States, in their exercise of the police power, becomes worthless.

It is to be observed in this connection that the cases relied on by the appellee were cases in which the Court had found that the rate was confiscatory, and therefore unconstitutional, and the jurisdictional question was therefore of less importance.

In the pending case the question as to the confiscatory nature of the rate is still an open one. The act itself has never been declared by any court unconstitutional.

It is urged upon the argument by the appellee, both orally and in the brief, that the order made by the Supreme Court safeguards the public interest. This suggestion does not aid the determination of the jurisdictional question. If the Court had jurisdiction and power to restrain the State from enforcing her criminal statutes, then this jurisdiction is independent of and would be just as strong without the protection which is safeguarded in the Court's order. If the Court has the power at all, it could have exercised it without requiring any security from the complainant; and in the law for the protection of child labor in textile factories and other manufacturing plants, the only way provided for the protection of the public or in which the public could be protected is through indictment of the owners, managers, superintendents and other chief officers of the company for permitting children under the limited age to work in the mills, and the Court could not protect the interests of the public.

It was argued by the appellee that if the Circuit Court did not have the power to restrain the State, even after a judgment of this Court declaring the rate confiscatory, the restraining order would be of no effect, and the State might still proceed with her indictments. The evil arising from such a consequence was urged as a reason for believing that the Circuit Court had the power to restrain the State from instituting criminal indictments. The conclusion does not seem to me to follow. It is not to be assumed that the States will not respect to the utmost limit the judgments of the Supreme Court of the United States. Whenever it appears to any court in any of the States of the American Union that the Supreme Court of the United States has decided any question of law or fact, that decision will be accorded absolute respect. There is no necessity for stretching the jurisdiction of the Circuit Court in order that the judgments of this Court may command the utmost respect. They have always been obeyed, and always will be obeyed. The

action of the State courts of North Carolina was taken not in opposition to the decisions of the Supreme Court, but because the State believed that the Court had held that the Circuit Court of the United States did not have the power to restrain the State. The course of the State was guided by what was said in *Fitts v. McGee.*

It was suggested during the argument that the complainant had as much right to go into the Circuit Court of the United States with its bill as it did into the courts of North Carolina, and that if it had gone into the North Carolina courts those courts would have had the power to restrain prosecutions on the part of the State. It is, of course, readily conceded that the Circuit Court had as much jurisdiction under the circumstances of this case as the State courts of North Carolina, but it is denied that the State courts of North Carolina could have restrained the State from proceeding with her indictments. If one of the Superior Courts of North Carolina, with the bill of the complainant before it, had have issued an order restraining the prosecution of the agents and servants of the Southern Railway, notwithstanding such restraining order, another Superior Court judge holding the courts in the district where the complainant's road runs, could have, and undoubtedly would have, proceeded to try the indictments found by the grand jury in the regular course of business against the agents of the railroad. When this agent was brought to his trial, he could have taken advantage of the pendency of the suit in the other Superior Court and of the restraining order only by plea in abatement to the jurisdiction of the Court trying it. When he attempted to make good the plea he would have been compelled to show both identity of subject matter and of parties, and he could have shown neither, the subject matter in the court of equity being solely the inquiry as to the confiscatory character of the rate, the subject matter in the criminal court being this and the additional question as to whether the indicted agent had violated the statute, and the parties in the equity case would have been the Southern Railway, complainant, against the Corporation Commissioners and the Attorney-General and the Assistant Attorney-General, while the parties in the criminal indictment

would have been the State of North Carolina, complainant, against the agent of the railroad company. It may be urged that this is technical, but if so it is a technicality founded in the wisdom of the law and illustrative of it.

The concurrent jurisdiction of the Circuit Courts of the United States and of the State Court is in no proper sense ever exclusive. Each of them pursues its own jurisdiction without regard to the other. Each of them can, of course, deal with the parties before the Court, and each of them will deal with the property which it has taken into its possession, and in so far as it becomes necessary to protect the property taken by such court and the persons in charge of such property, the court which first assumes jurisdiction exercises it to the fullest extent and with unlimited authority for protecting property in its possession and the officers whom it has directed to control such property. The Circuit Judge seems to have had this distinction in his mind in the opinion which he rendered in the equity case pending before him. He proceeded and counsel for appellee have argued upon the idea that the order of the Circuit Judge directing the railroad company to issue coupons for the excess of the rate charged over the rate provided for by the legislative act, had the effect of taking the railroad property into the possession of the Circuit Court and of making the agents of the railroad substantially the servants and officers of the Circuit Court. There is nothing in the bill nor in the restraining order which justifies this conclusion. The complainant in the Circuit Court was the Southern Railway. It asked not to have itself and its agents forbidden to sell tickets at the legislative rates, but to forbid the Corporation Commissioners and the Attorney-General and the Assistant Attorney-General from enforcing the rate. It would not have been a violation of the restraining order for the complainant through its agents, nor for the agents on their own responsibility to have sold tickets at the legislative rate. The coupons provided for by the order of the Court were the conditions made by the Court upon which the prayer of the complainant was granted. The coupons were only to be issued, as the coupons themselves show, for the sums in excess of the legislative rate, and if tickets were sold at the legislative rate, or even below it, no coupons were to be issued.

3. The appellee was not entitled to have been discharged under a writ of habeas corpus, because even if the Circuit Court had jurisdiction of the bill in equity and had the power to make the order restraining the State from prosecuting the criminal indictments against the agents of the railroad, there was no emergency, nothing extraordinary, no unusual circumstances calling for the writ of habeas corpus. The appellee could have made his defense in the State court. He could have availed himself of the order of the Circuit Court and could have shown, if his contention here be correct, that the State court had no jurisdiction in the premises. He need not have gone to the trouble and expense of proving the rate to be confiscatory if the effect of the Circuit Court order was to stay the hand of the State. If convicted in the police court at Asheville he could have appealed to the Superior Court of Buncombe County, where he would have been tried *de novo;* if convicted in the Superior Court he could have appealed to the Supreme Court of the State, and if the judgment had there been affirmed, he could, by writ of error, have brought his case to this court. There is in his case no question of excessive bail and no denial of any rights. It is an ordinary case of one indicted in a State court seeking to have the lawfulness of his conviction determined, not in the orderly course of procedure, but by the extraordinary writ of *habeas corpus.* If the appellee is finally discharged and this Court should finally determine when the cause reaches it that the rate is not confiscatory and is constitutional, then the appellee can not be put upon his trial for having violated the law of the State. The evil consequences which will flow from such a course are not to be overlooked. The power which is close to the people ought to be universally recognized as having authority with a strong hand to suppress crime, and it ought not to be made easy for criminals convicted in the State court to flee from those courts to the Circuit Courts of the United States and there gain their discharge. The Union is never so strong as when the States have full power in matters of police regulation, with ample authority to preserve the public peace, the public health, the public morals and the general welfare of the people within the State. With each State strong in her sovereign power within

the limits of her authority, held in an indissoluble union by interest and affection, protected by the Constitution of the United States, and recognizing that as the supreme law of the land the hope of the fathers has become a fact, and peace and domestic tranquillity will continue a more perfect union.

C. B. AYCOCK,
Of Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

No. 474.

THOMAS F. HUNTER, Sheriff of Buncombe County, North Carolina, Appellant,

v.

JAMES H. WOOD, Appellee.

BRIEF FOR APPELLEE.

Walker D. Hines,
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Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 474.

THOMAS F. HUNTER, SHERIFF OF BUNCOMBE COUNTY, NORTH CAROLINA, APPELLANT,

v.

JAMES H. WOOD, APPELLEE.

BRIEF FOR APPELLEE.

Statement of the Case.

At the time of the convening of the Legislature of the State of North Carolina in the year 1907 the Corporation Commission of that State had power to fix rates, conferred by section 1099 of the acts of the General Assembly of North Carolina in respect to the Corporation Commission, which will be found in chapter 20 of the Revisal of 1905 and in the amendments adopted by the Legislature of 1905. That act, so far as important in this connection, is as follows:

> "The Commission shall make reasonable and just rates—
>
> "1. Of freight, passenger and express tariffs for railroads, street railways, steamboats, canal and express companies or corporations, and all other trans-

portation companies or corporations engaged in the carriage of freight, express or passengers.

"2. For the through transportation of freight, express or passengers."

The only limitation upon the power of the Commission in respect to the maximum of passenger rates is found in subsection 9 of section 2567 of the Revisal of North Carolina of 1905, which is as follows:

"Every railroad corporation shall have power:

* * * * * * *

"9. To regulate the time and manner in which passengers and property shall be transported and the compensation to be paid therefor; and such compensation for any passenger and his ordinary baggage *shall not exceed five cents per mile.*"

By section 2618 of the Revisal of 1905 it was provided:

"All railroad companies shall furnish first and second class passenger accommodations."

The Corporation Commission, pursuant to the authority of section 1099, *supra*, fixed the standard passenger tariff as follows:

	First class.	Second class.
Twelve years and over.....	3¼¢	2¾¢
Over five and under twelve years of age	One half first-class fare.	

The above-mentioned rates were in force when the General Assembly of North Carolina convened in January, 1907.

By an act ratified on the second day of March, 1907, the following was placed upon the statute books of North Carolina:

"An act prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina.

"The General Assembly of North Carolina do enact:

"SECTION 1. That no railroad company doing business as a common carrier of passengers in the State of North Carolina, except as hereafter provided, shall charge, demand or receive for transporting any passenger, and his or her baggage not exceeding in weight two hundred pounds, from any station on its railroad in North Carolina to any other station on its said road in North Carolina, a rate in excess of two and one-quarter cents per mile, and for transporting children twelve years of age or under, one-half of the rate above described: Provided that the Corporation Commission of North Carolina is hereby authorized and empowered to permit all independently owned and operated railroad companies in North Carolina, whose mileage of road in said State is sixty miles or under, to charge a rate for transporting passengers not in excess of the present rate fixed and prescribed for said road; and also to permit all railroads constructed within the twelve months preceding the first day of January, nineteen hundred and seven, or at that time in course of construction, for a term of two years from and after July 1st, 1907, and also such railroads as may be constructed within two years from January 1, 1907, to charge such rate in excess of the rate above prescribed as the said Commission may determine to be reasonable. A charge of ten cents may be added to the fare of any passenger when the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train; and no railroad company shall be required to accept a single fare for less than five cents.

"SECTION 2. In the case that any railroad company operating as a common carrier of passengers in the State of North Carolina is owned, controlled or operated by lease or other agreement by any other railroad company doing business in this State, the rate for carrying passengers thereon as prescribed in

this act shall be determined for said railroad by the rate prescribed by this act for the railroad company which owns, controls or operates the same; and the North Carolina Corporation Commission shall publish the rates fixed by this act for the several railroad companies operating in this State, on or before the first day of June, 1907.

"SECTION 3. That mileage books of one thousand miles in each book shall be kept on sale at such railroad ticket offices in North Carolina as shall be named and designated by the Corporation Commission of North Carolina, and when such mileage book is purchased it shall be good in the hands of any person or persons named therein on all railroads on which the fare is the same as or less than the fare on the road of the company selling such mileage book; and when the mileage is detached from said book by any other railroad company than the one which sold it, the said mileage shall be redeemable on demand by the railroad company which sold it.

"SECTION 4. That any railroad company violating any provision of this act shall be liable to a penalty of five hundred dollars for each violation, payable to the person aggrieved by such violation, and recoverable in an action to be instituted in the name of said person in any court of this State having competent jurisdistion thereof. And any agent, servant, or employé of any railroad company violating this act shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

"SECTION 5. That any person or persons, except those permitted by law, who accept free transportation shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

"SECTION 6. That section 2618 of the Revisal of 1905 is hereby repealed, and all laws and clauses of laws in conflict with this act are hereby repealed.

"SECTION 7. That this act shall be in force from and after July 1st, 1907."

By an act ratified on the ninth day of March, 1907, the following was placed upon the statute books of that State:

"An act to prevent unjust discrimination in freight rates and to fix the maximum charges therefor.

"*The General Assembly of North Carolina do enact:*

"SECTION 1. That the Corporation Commission, created by the laws of North Carolina, shall not, in fixing the maximum rates and charges, or tariff of rates or charges for any common carrier transporting freight in North Carolina, permit or allow any such common carrier to charge, collect or receive a greater toll, charge or rate for the transportation of any article of freight or commodity embraced in the present classification fixed and prescribed, or approved by said Corporation Commission where the initial point of shipment is on the road or line of one common carrier in this State and the terminal point of said shipment is on the line or road of another common carrier in this State, than is the sum of the present local rates now established, prescribed or approved by said Corporation Commission, less a reduction of twenty-five per centum of the said local rates on all railroads for which there is now made or prescribed a reduction for a joint haul; and on those railroads for which there is not now prescribed a reduction on joint hauls a reduction of fifteen per centum of the local rates now established, prescribed or approved by said Corporation Commission for said railroads; *Provided,* That those railroads of this class whose rates are lower than the Corporation Commission's standard of freight rates may be permitted by said commission to adopt the standard rates prescribed by said commission; *Provided,* That the Corporation Commission is hereby empowered to reduce the said local rates whenever in its opinion and after investigation by it it shall determine that a lower rate is reasonable: *Provided, further,* That present local rates now established, prescribed or approved by said Corporation Commission shall not be increased by classification or otherwise.

"SECTION 2. That any railroad company doing business in the State of North Carolina, or officer or agent thereof, who shall give to any person or shipper any advantage over another person or shipper under like circumstances by way of any rebate or reduced rate not authorized by law, or by the North Carolina Corporation Commission, or which shall make charges for shipments of freight in violation of the provisions of this act, or shall wilfully discriminate in the matter of service in favor of one person or corporation against another under like circumstances, shall be guilty of a misdemeanor, and such corporation shall, upon conviction, be fined not less than one hundred dollars, and such officer or agent shall be fined or imprisoned or both, in the discretion of the court; and any shipper or consignee of any freight in the State of North Carolina who shall knowingly accept any rebate or other consideration or service from any railroad company which is not allowed or given other shippers or consignees under like or similar circumstances, and which is not allowed by law, shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court.

"SECTION 3. That whenever any person, firm or corporation intending to ship freight makes a written application to any railroad company for a car or cars to be loaded in carload lots with any kind of freight embraced in the tariffs of said company, stating in said application the character of the freight, the number of cars wanted, the station, depot siding, wharf or boat landing on the road or line of said railroad company whence the shipment is to be moved, and its final destination, the railroad company shall furnish the said car or cars within four days from seven o'clock a. m. the day following such application, which said application shall be delivered to the agent of the railroad company at the station at or nearest the point of shipment. Any railroad company failing to furnish the car or cars named in said written application shall be subject to a penalty of five dollars per car per day for each car not furnished, to be recovered by the person, firm or corporation making said application: *Provided*, That

the said railroad company before furnishing the car or cars upon said application of the shipper may require the person, firm or corporation applying for the same to deposit five dollars for each car so demanded at the time the application is made, which said deposit of five dollars for each car may be retained by the said railroad company as a forfeit for trackage, in case the car or cars are not loaded within forty-eight hours after notice of the placing of said car or cars in accordance with said demand: *Provided* That the Corporation Commission may excuse from the penalties imposed by this section independent lines not owned, operated or controlled by any other line or system when trackage is less than one hundred miles.

"SECTION 4. That section two thousand six hundred and thirty-two of the Revisal of one thousand nine hundred and five of North Carolina be, and the same is hereby amended as follows: By striking out the words 'twenty-five' in line eleven of said act and inserting in lieu thereof the word 'fifteen,' and by striking out the word 'five,' the last word in said line, and inserting in lieu thereof the word 'two,' and by further striking out the words 'twelve and fifty one-hundredth' in lines fourteen and fifteen thereof and inserting in lieu thereof the word 'ten,' and by further striking out the words 'two and fifty one-hundredths' in line fifteen and inserting in lieu thereof the word 'one.'

"That this section four shall not apply to existing causes of action.

"SECTION 5. The Corporation Commission is hereby directed to prepare and publish the tariff of rates, charges and tolls to be charged and collected by railroad companies in this State, as authorized by this act, on or before July the first, one thousand nine hundred and seven.

"SECTION 6. This act shall be in force from and after July the first, one thousand nine hundred and seven.

"In the General Assembly read three times and ratified this the 9th day of March, 1907."

From these two acts, and especially from the act in respect to passenger rates, it will be seen that the rates already fixed by the authority of the State were very materially reduced by the action of the Legislature, and that the authority of the Commission to fix passenger rates was so far qualified that the two classes of fare were abolished, and that the rates fixed by them should not exceed a maximum of two and one-quarter cents per mile.

Regarding these legislative acts as confiscatory, on May 8, 1907, the Southern Railway Company, a corporation of the State of Virginia, filed its bill of complaint in the Circuit Court of the United States for the Eastern District of North Carolina. The parties defendant were Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, Robert D. Gilmer, and Hayden Clement, all of whom were citizens of the State of North Carolina.

The bill of complaint, after alleging the diverse citizenship of the parties and the incorporation of the plaintiff, alleged that the complainant owned and operated 6,989.12 miles of railroad in the States of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, Kentucky, Indiana, and Illinois, of which 1,456.72 miles were in North Carolina.

The fourth paragraph of the bill is as follows:

> "4. That the complainant is, and continuously since its organization aforesaid has been, engaged in doing an intrastate business as a common carrier of freight and passengers in the State of North Carolina, and in addition is, and continuously since its said organization has been, engaged in doing, as a common carrier of freight and passengers, a large interstate business in said State of North Carolina, and in and between said State and the other States aforesaid, and other States of the United States, and in and between other States and Territories of the United States, and also is, and since its said organization has been, engaged in said State and the other States aforesaid in foreign commerce."

The next paragraph set out *in hæc verba* the two acts fixing passenger and freight rates, given above.

The sixth and seventh paragraphs of the bill are as follows:

> "6. At its session held in the year 1899 the General Assembly of North Carolina passed an act entitled 'An act to establish the North Carolina Corporation Commission.' Said act has been since amended and as amended provides for the election of three commissioners who shall be known as the North Carolina Corporation Commission, and that each of said commissioners shall take an oath to support the constitution and laws of the State of North Carolina and to well and faithfully execute the duties of his office as a member of the North Carolina Corporation Commission. Said act, as so amended, further provides that said commissioners shall have such general control and supervision of all railroad companies or corporations engaged in the carrying of freight or passengers necessary to carry into effect the provisions of said act and shall have full power to obtain the information necessary for carrying into effect, and otherwise enforcing, the provisions of said act. Said act, as so amended, further provides that if any railroad doing business in the State of North Carolina, or if any such company organized under the laws of any other State and doing business in the State of North Carolina shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, such railroad or company shall be deemed guilty of extortion and upon conviction thereof shall be fined not less than five hundred dollars nor more than five thousand dollars. Said act, as so amended, further provides that any railroad or corporation which violates any of the provisions of said act, or refuses to conform to, or obey, any rule, order or regulation of said commission shall, in addition to the other penalties prescribed in said act, forfeit and pay the sum of five hundred dollars for each offense, to be recovered in

an action to be instituted in the Superior Court of Wake County in the name of the State of North Carolina on the relation of the North Carolina Corporation Commission, and that each day such company, or corporation, continues to violate any provision of said act or continues to refuse to obey or perform any rule, order or regulation prescribed by said North Carolina Corporation Commission shall be a separate offense. Said act, as so amended, further provides that said Corporation Commission whenever in its judgment any corporation has violated or neglected in any respect to comply with the provisions of any law of the State, shall give notice thereof in writing to such corporations, and, if the violation or neglect is continued after such notice, shall forthwith present the facts to the Attorney General who shall take such proceedings thereon as he may deem expedient. By the laws of North Carolina the Assistant Attorney General is invested with the same powers, and is required to perform the same duties, as the Attorney General, among them being the powers and duties just mentioned as appertaining to the Attorney General.

"7. That the above-mentioned defendants, Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield, constitute the Corporation Commission of the State of North Carolina, the said Franklin McNeill being chairman, and the said Samuel L. Rogers and Eugene C. Bedingfield being associate members, thereof, and that the defendant Robert D. Gilmer is the Attorney General of the State of North Carolina and the defendant Hayden Clement is the Assistant Attorney General of said State; and all of said defendants have their offices in the city of Raleigh in the State of North Carolina, and the defendants Franklin McNeill, Eugene C. Beddingfield and Robert D. Gilmer are inhabitants of, and reside in, the Eastern District of North Carolina."

The bill then alleged that the existing rates and charges in use on complainant's line were no more than just and reasonable; that taking the ad valorem assessment upon the

property of the complainant in North Carolina as fixed by the authorities of that State and assigning to intrastate traffic the ratio of such value that the gross intrastate traffic revenue in North Carolina bore to the total gross traffic revenue in the State of North Carolina would result in showing that the value of complainant's property used in North Carolina for intrastate purposes, on the basis of the North Carolina assessment for purposes of taxation, was $7,213,222.74; that, applying the rates as fixed by these acts to the business for the year ending June 30, 1906, there would have resulted to the complainant a return of only thirty-nine one-hundredths (39/100) of one per cent. on the said tax value before allowing anything for payment of interest on bonds or dividends on stock. The bill alleged that these figures and their net result were fairly representative of past and future conditions, except that the operating expenses of the plaintiff had, since June 30, 1906, increased relatively far more than its gross revenue, and therefore the net result would in future be even more unfavorable and yield a still smaller return to the complainant than as shown for the year ending June 30, 1906.

The bill showed that the Corporation Commission of North Carolina, in pursuance of its authority to make reasonable and just rates of freight and passenger charges, had, prior to the passage of the 2¼-cent passenger rate act, fixed passenger rates in North Carolina at 3¼ cents per mile for first-class and 2¾ cents per mile for second-class; that since these rates were fixed the cost of performing the service by the complainant had largely increased, and in consequence thereof these rates should, in order to be now just and reasonable, be increased instead of decreased.

The complainant alleged that the result of these acts was to deprive it of its property without due process of law, and to deny to it the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

The bill further alleged that by the "Act in Respect to Freight Rates" it was provided that any railroad company doing business in the State of North Carolina, or officer or agent thereof, who shall make charges for shipments of freight in violation of the provisions of the act shall be deemed guilty of a misdemeanor, and such corporation shall, upon conviction, be fined not less than one hundred dollars, and such officer or agent shall be fined or imprisoned, or both, in the discretion of the court; and that by the "Act in Respect to Passenger Rates" it was provided that any railroad company violating any provision of the act shall be liable to a penalty of five hundred dollars for each violation, payable to the person aggrieved by such violation, and recoverable in an action to be instituted in the name of said person in any court of North Carolina having competent jurisdiction thereof, and any agent, servant, or employee of any railroad company violating said act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court; and that the complainant was advised that the effect of said acts is, in addition to the punishment of the officer, agent, servant, or employee for a misdemeanor, to impose upon the complainant for each shipment of freight at a greater rate than is allowed by the act in respect thereto a fine of one hundred dollars, and for each sale of a passenger ticket at a rate greater than is allowed by the act in respect to passengers a fine of five hundred dollars; and that an effort was thus made to prevent by these enormous penalties, which are in their nature confiscatory of the complainant's property, any inquiry into the validity of these particular statutes, and to so burden any challenge thereof in the courts that the complainant and the others affected thereby must necessarily submit rather than take the chances of the penalties imposed, and that the complainant was advised that the effect of these penalties and of the legislation which imposed them was, because no other person or business in North Carolina

is subjected to such penalties under similar circumstances, to deprive the complainant of the equal protection of the laws, and, moreover, was a denial to the complainant of due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, whose protection the complainant claimed.

It was further shown in said bill that the Corporation Commission of North Carolina was required by the "Act in Respect to Freight Rates" to prepare and publish, before the same should go into effect, the tariff of rates, charges, and tolls to be charged and collected by railroad companies in the State of North Carolina, as authorized by that act; and that by the "Act in Respect to Passenger Rates" the Commission was required, before the time the rates were directed to go into effect, to classify the roads in respect to their charges, and to publish the passenger rates fixed by the last-mentioned act; and it was further alleged that the Corporation Commission of North Carolina was further required by the laws of that State, if the complainant, in the opinion of such Commission, violated the "Act in Respect to Freight Rates," or the "Act in Respect to Passenger Rates," and should charge a rate in excess of the amount permitted by such acts respectively, to give notice in writing to the complainant of such violation, and, if such charge in excess of the rates fixed by said acts was continued after such notice, the Commission was required to present the facts forthwith to the Attorney General, and the Attorney General and the said Assistant Attorney General were required to take such proceedings thereon as they might deem expedient; and the complainant alleged that, unless prevented by the injunction of the court, the said Franklin McNeill, Samuel L. Rogers, and Eugene C. Beddingfield, constituting the Corporation Commission of the State of North Carolina, would, for the purpose of putting the same into effect, make up and publish said tariff of freight charges as provided by the "Act in Respect to Freight Rates," and would undertake to classify the complainant and the

other carriers of North Carolina in accordance with, and would publish the passenger rates prescribed by, the "Act in Respect to Passenger Rates," and would, in case the complainant should exercise its constitutional right to make charges in excess of the rates fixed by the two acts respectively, proceed against the complainant for a violation thereof, and Robert D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, would in such case proceed to impose the penalties prescribed by the two acts on this complainant therefor.

The act of Assembly of North Carolina to which special reference is made in this last-mentioned allegation is section 1113 of the acts relating to the Commission, which is as follows:

> "The Commission, whenever in its judgment any corporation has violated *any* law, shall give notice thereof in writing to such corporation, and if the violation or neglect is continued after such notice, shall forthwith present the facts to the Attorney General, who shall take such proceedings thereon as he may deem expedient."
>
> Acts 1899, ch. 64, section 8.

Other acts of North Carolina in force at the time the bill was filed, and now in force, in respect to the relations of the Corporation Commission to this matter are as follows:

> "The Corporation Commission shall have such general control and supervision of all railroad, street railway, steamboat, canal, express and sleeping car companies or corporations, and of all other companies or corporations engaged in the carrying of freight or passengers, and of all telegraph and telephone companies, of all public and private banks, and all loan and trust companies or corporations, and of all building and loan associations or companies necessary to carry into effect the provisions of this chapter and the laws regulating such companies."
>
> Revisal of 1905, section 1066.

"It shall be the duty of the Attorney General,

"1. To defend all actions in the Supreme Court in which the State shall be interested, or is a party; and also when requested by the Governor or either branch of the General Assembly to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested.

"2. At the request of the * * * Corporation commissioners * * * he shall prosecute and defend all suits relating to matters connected with their departments."

* * * * * * *

Revisal of 1905, section 5380.

The complainant prayed for a temporary restraining order and an interlocutory and a final injunction.

Upon presentation of the bill to the Honorable J. C. Pritchard, of the United States Circuit Court, on May 8, 1907, a restraining order was issued and the motion for an interlocutory injunction set down for hearing Wednesday, June 26, 1907. On the day so fixed the parties complainant and defendant appeared. The bill of complaint and the answer were treated as affidavits, and other affidavits were filed by the complainant. The court granted an interlocutory injunction. This order provided that until the further order of the court the defendants, McNeill, Rogers, and Beddingfield, constituting the Corporation Commission of North Carolina, and each of them, individually and jointly, as constituting the Corporation Commission of North Carolina, and each and all of their successors in office, and their and each of their agents and employees, be, and they were thereby, enjoined and restrained from preparing or publishing the tariff of rates, charges, or tolls mentioned in the freight rate act, or from publishing the rates fixed by the passenger rate act; and, further, that until the further order of the court the above-named defendants and each and all of their successors in office, and their and each of their attorneys and employees, and the defendants, Robert D. Gil-

mer, Attorney General, and Hayden Clement, Assistant Attorney General, their and each of their successors in office, and their and each of their attorneys, agents, and employees, are and each of them is "hereby restrained and enjoined from taking any step or steps in pursuance of said act in respect to freight rates or of said act in respect to passenger rates, or of any laws of the State of North Carolina, either directly or through any other attorney, agent or employee or otherwise, or by any suit, prosecution or proceeding, civil or criminal, or in any other manner, for the purpose of enforcing or endeavoring to put into effect, as against the complainant or any of its officers, agents or employees, or to force the complainant or any of its officers, agents or employees to put into effect said act in respect to freight rates or said act in respect to passenger rates, or any part of either of said acts, or the penalties prescribed or provided for in either of said acts, or any other penalties or punishments against the complainant, Southern Railway Company, or against any of its officers, agents or employees, for failure to put into effect or to observe on any of the lines of the said complainant in North Carolina, the freight rates or the passenger rates prescribed or provided for in said acts or either of them, or for failure to comply with either of said acts or with any provision of either of them."

The other clauses of said injunction, from 3 to 12, inclusive, are as follows:

> "3. That, until the further order of the court herein, all other individuals and corporations are and each of them is, hereby restrained and enjoined from instituting, or prosecuting, any suit or prosecution or other proceeding, either civil or criminal, against said complainant, or against any officer, agent or employee of said complainant, for the recovery or imposition of any penalty or punishment, under or by virtue of said act in respect to passenger rates, or the said act in respect to freight rates, or under or by virtue of any law of North Carolina, because of, or growing out of, the failure of the said complain-

ant, or any of its officers, agents or employees, to put into effect, or to observe, on any of the lines of the complainant in North Carolina the freight rates or the passenger rates prescribed in said acts, or in either of them, or to comply with any of the provisions of either of said acts, or for the recovery of any damages or overcharges, because of, or growing out of, any such failure, or for the enforcement of any claim, alleged right or cause of action, growing out of, or connected with, any such failure.

"4. That said complainant, or some one for it, shall, before a judge of this court, or the clerk thereof, execute a bond in the penalty of three hundred and twenty-five thousand dollars, with surety, to be approved by such judge, or by such clerk, conditioned to pay into the registry of this court, from time to time, when and as the court may so order, such sum or sums of money as shall be equal to the difference between the aggregate freight and passenger rates and excess baggage charges charged and received by it for intrastate service on its lines in the State of North Carolina, and what would have been the aggregate amount for such services at the rates fixed in or under the said acts of Assembly; and further conditioned that, whereas an interlocutory injunction has been issued in the above-entitled cause, by the terms of which the defendants, and each of them, are restrained until the further order of the court, as from said order will appear, now, should such interlocutory injunction be dissolved or vacated as having been wrongfully issued, or because the said acts were improperly restrained, then that the complainant shall pay, or cause to be paid, all damages caused by the issue of such interlocutory injunction and the costs of this cause in connection therewith.

"5. That the complainant shall give to any person purchasing a ticket for intrastate travel on its lines in the State of North Carolina, and to any person purchasing a mileage book for travel on its lines in North Carolina, but not good outside of said State, a transferable coupon, or other written or printed evidence, representing the sum which such person, or his transferee, will, upon a final decision in this cause

upholding the validity of said act in respect to passenger rates, be entitled to receive, out of the cash deposit to be made in the registry of this court in pursuance of the obligation of the bond hereinbefore mentioned. The form of said coupon, or of other written or printed evidence, shall be substantially as follows:

"'SOUTHERN RAILWAY COMPANY.

"'*North Carolina Ticket Claim Coupon.*

"'To be Retained by Passenger. Not Good for Passage.

"'Issued under an order of the Circuit Court of the United States for the Eastern District of North Carolina, in a suit therein pending between Southern Railway Company, complainant, and Franklin McNeill *et al.*, defendants.

"'Southern Railway Company has, on the date stamped hereon, received in connection with the sale of the ticket of corresponding form and number, the rate designated in the tariff of this company in effect on date of sale, for travel between points designated in such ticket within the State of North Carolina, to which ticket this coupon is attached. This coupon is evidence only of a claim for the difference between the amount received and what would have been the amount if the distance covered by said ticket had been paid for at the rate fixed by North Carolina act, approved March 2, 1907, prescribing maximum passenger charges, and is payable only on the order and out of the registry of said court, upon surrender to the court of this coupon, and upon such conditions, if any, as said court may impose, provided it should be finally determined in said suit that the said claim is entitled to such payment.

"'In case the ticket with which this coupon corresponds is presented for redemption it must be presented at general passenger agent's office, Washington, D. C., accompanied by this coupon, either for surrender or for appropriate notation.'

"And the complainant shall give to any person checking baggage to be carried by the complainant between two points both of which are in the State of North Carolina, and which does not pass out of the State en route, and who has paid to the complainant any charge thereon for excess baggage, a transferable coupon or other written or printed evidence, representing the difference between the amount so paid and what would have been paid if there had been an allowance to such person of two hundred pounds of baggage, as provided in said act in respect to passenger rates, such difference to be payable to such person or to his transferee, upon a final decision in this cause upholding the validity of such act in respect to passenger rates, out of the cash to be deposited in the registry of this court, in pursuance of the obligation of the bond hereinbefore mentioned; such coupon, or other written or printed evidence, shall be substantially in the following form:

"'SOUTHERN RAILWAY COMPANY.

"'Issued by Southern Railway Company.

"'*North Carolina Excess Baggage Check.*

"'North Carolina Excess Baggage Claim Coupon to be Retained by Passenger.

"'Issued under an order of the Circuit Court of the United States for the Eastern District of North Carolina, in a suit therein pending between Southern Railway Company, complainant, and Franklin McNeill *et al.*, defendants.

"'Southern Railway Company has received, in connection with the issuance of excess baggage check of corresponding form and number, the amount computed from the excess baggage tariff of this company in effect on July 1, 1907, for the transportation of the passenger's baggage in excess of 150 pounds in weight, between the points designated in such excess baggage check within the State of North Caro-

lina, to which excess baggage check this coupon is attached.

" 'This coupon is evidence only of a claim for the difference between the amount received and what would have been received, had there been an allowance to the passenger of 200 pounds of baggage, as provided in the North Carolina act, approved March 2, 1907; and is payable only on the order, and out of the regstry of said court, upon surrender to the court of this coupon, and upon such conditions, if any, as said court may impose, provided it should be finally determined in said suit that the said claim is entitled to such payment.'

"But nothing herein contained shall be construed as requiring the complainant to issue any such coupon, or any such other written or printed evidence, in connection with the sale of any mileage book, or any ticket, good for an interstate passage or for passage in another State or in other States.

"6. That the complainant shall preserve, to be produced whenever so ordered by the court herein, all canceled tickets and excess baggage check stubs, in respect to which such coupons or other written or printed evidences may have been issued, and may be outstanding, and shall from time to time report to the court, at intervals to be fixed by an order of the court herein, statements showing the revenue by it charged and collected for its services in the North Carolina intrastate transportation of passengers, baggage and freight in excess of the amounts permitted by said act in respect to passenger rates and said act in respect to freight rates. As to each of such shipments of freight the complainant shall report the name of the shipper, the date and place of shipment, and the amount of such excess. The complainant shall from time to time give such further bond or bonds as the court may require to secure the proper payment into the registry of the court of all the amounts which finally it shall be adjudged that it should so pay, under the final decision in this cause.

"7. If it shall be determined herein that the complainant is entitled to the amounts covered by said

bond or bonds, then said bond, or bonds, shall be released and canceled by the court, and, if any amount shall have then been paid into the registry of the court pursuant thereto, then, upon such determination in favor of the complainant, the sum, or sums, so paid into the registry shall be repaid to the complainant without further order of the court herein.

"8. Leave is hereby granted to the complainant, if it be so advised, to make, by supplemental process, as new parties-defendant, any person or corporation, attorney or solicitor, who may attempt or threaten to assert, or enforce, against the complainant or against any of its officers, agents or employees, any alleged right, remedy, penalty or punishment, under either of said acts or otherwise, because of the failure of the complainant, or of any of its officers, agents or employees, to put into effect, or to observe, any rate prescribed in said act in respect to passenger rates, or in said act in respect to freight rates, or any other provision of said acts, or either of them.

"9. That the restraining order heretofore granted in this cause shall be construed as remaining in full force and effect until this interlocutory injunction shall take effect.

"10. It is further ordered that a writ of injunction shall forthwith issue in accordance with this order.

"11. The defendants, having by counsel in open court stated that they regard the answer filed on the said motion for an interlocutory injunction as their answer in this cause, and having given their consent that the same shall be so considered, and that the complainants shall forthwith file a replication thereto, and that the said cause shall be considered at issue, it is now ordered that it be referred to the Hon. W. A. Montgomery, standing master of this court for the Eastern District of North Carolina, to take and to the court report such evidence on any of the issues herein as either party may offer, and to make all needed computations, and report fully to the court the facts thereon; that for that purpose the master shall have the right to sit from time to time in the city of Washington and at any point he may elect in the

State of North Carolina or elsewhere, for the purpose of facilitating the taking of the said evidence, and the said hearing before him, and that he shall report to the court the said evidence and his findings thereon not later than the 25th day of September, 1907. The said master shall determine what time is to be allotted to the complainant for the taking of its evidence and what time shall be allotted to the defendants for the taking of their evidence.

"This cause, by consent of the parties hereto given in open court, is set down for hearing before this court in the city of Asheville, on the first Monday of October, in the year 1907.

"12. Thereupon the complainant tendered its bond to comply with the provisions in respect to a bond in this order fully executed by the complainant, as principal, and by the United States Fidelity and Guaranty Company, as surety, which said bond and the execution thereof and the surety thereto are approved."

In substance, this order provided that with every ticket sold the complainant should give to the purchaser a coupon representing the difference between the then existing rate (3¼ cents for first class and 2¾ cents for second class) and the 2¼-cent rate fixed by the passenger-rate act; and ample provision was made, in case it should be finally determined that the passenger-rate act was valid, that these coupons would be redeemed upon presentation.

The cause thereupon having been matured by consent, it was ordered that it be referred to the standing master, to take and to report to the court such evidence on any of the issues involved in the case as either party might offer, to make all needed computations, and report to the court.

The bond required by the complainant was given and the coupons directed by the court were attached to all intrastate tickets sold in the State of North Carolina after the first day of July, 1907, and delivered to all persons who purchased such tickets.

On the 16th day of July, 1907, an ancillary bill was filed in the Western District of North Carolina, copy of which will

be found in the record, setting forth the original bill in the eastern district and praying for the aid of the Circuit Court of the United States for the Western District in respect to the same matters and for the same purposes as those set forth in the original bill. On that date the Honorable J. C. Pritchard, judge of the Circuit Court of the United States for the Western District of North Carolina, issued a restraining order in accordance with the terms of the restraining order already granted in the eastern district, a copy of which will also be found in the record.

It is to be noticed that the order for the interlocutory injunction was entered June 26, 1907, and that the passenger-rate act was to go into effect July 1, 1907.

Notwithstanding the granting of the said restraining orders and said order of interlocutory injunction, as above described, and the security thereby given the traveling public, there commenced, immediately after July 1, a determined effort upon the part of the authorities of North Carolina to render vain and nugatory the provisions of the order in regard to the sale of tickets for passenger travel within the State of North Carolina, to force the complainant to put into effect the statutory rate of 2¼ cents per mile, and to abandon the protection afforded to it by the terms of the order; to defeat the jurisdiction of the Circuit Court of the United States in respect to the interlocutory relief which had been thereby accorded to the complainant; to compel the complainant, notwithstanding the fact that the court had taken jurisdiction of the cause and of all of the questions involved, to abandon the jurisdiction which it had thus invoked, to submit its cause to the State tribunals of North Carolina, and thus to surrender rights in the premises which are guaranteed to it by the Constitution and laws of the United States.

The steps which were taken by the authorities of North Carolina to this end will, so far as they are shown by this record, now be more particularly stated.

It is shown by the evidence in this case that more than one million five hundred thousand intrastate tickets are sold annually by the Southern Railway Company in North Carolina, and consequently the money penalties prescribed by the passenger act in favor of individuals would amount in one year (a brief period in which to carry to a conclusion the litigation instituted to test the constitutionality of the act) to more than seven hundred and fifty million dollars, and the penalties against the company's officers and employees, in addition to fines which have no maximum limit, might involve imprisonment in jail and convict work on the public roads for more than one million five hundred thousand years. To enforce such penalties pecuniary and degrading would not be law, but destruction.

But such an endeavor was at once set on foot and prosecuted with remorseless vigor.

1. A prosecution was begun in the Superior Court of Wake County, North Carolina, at Raleigh, against the Southern Railway Company and T. E. Green, one of its agents, charging the company and the defendant Green with a misdemeanor for violating the passenger act in selling a ticket at more than the statutory rate, although this was done under the protection of the orders of the United States court, as above set forth. This action, notwithstanding the plea that the United States court had taken jurisdiction of the matter, and that the things done were done in pursuance of its orders, was at once pressed to trial, and resulted in a fine of thirty thousand dollars being imposed upon the company for the sale of one ticket and a fine of five dollars being placed upon its agent. This judgment of thirty thousand dollars against the company has since been reversed by the Supreme Court of North Carolina, on the ground that no such offense against the company as a misdemeanor was created by the act in question, and that this criminal proceeding against the company was entirely lacking in legal warrant.

2. The Governor of North Carolina, on the sixteenth of July, 1907, issued a proclamation to the judges of the State, which appears in the record, in which he declared that the United States court had no jurisdiction, that its order should not be regarded, and asked the judges of the Superior Court of the State to instruct the grand juries and to direct the solicitors of their respective districts to send bills against the agents and employees of the railroads and their higher officers for selling tickets, and he did this notwithstanding the fact that the railroads were proceeding in the manner authorized and protected by the order of the United States court. In this proclamation he stated, among other things, as follows:

> "I desire no conflict between the Federal and State authorities, and there will be none, if the plain letter of the decisions of the Supreme Court of the United States is observed, but as Governor of the State I feel a great wrong is being done the State, and, therefore, desire that *in our own tribunal* this law shall be fairly and fully tested. This can be done by indicting the violators of said law, and letting them come into court making their defense, thus raising the constitutionality of this act, and the right of a Federal judge to abrogate it, before first declaring it unconstitutional.
>
> "As chief executive of the State, I stand ready to aid you in every way possible in enforcing the laws."

3. It is shown by the evidence that shortly prior to the eighteenth of July, 1907, the police justice of Asheville had sought out a person named Wells and had procured him to swear out a warrant before such police justice, charging Wood, the appellee here, and another of the agents of the Southern Railway Company with selling tickets at a rate greater than 2¼ cents prescribed by the passenger act above referred to; that Wood and this other agent were thereupon arrested, but the police justice, hearing that a writ of *habeas corpus* was being sued out for their release, dismissed the

warrants; that later, and on the eighteenth day of July, 1907, learning that the judge of the Circuit Court of the United States had just left Asheville, another warrant was sworn out against the appellee Wood, and he was arrested, and on the following day carried before the police justice, convicted, and sentenced during the absence of the circuit judge; that on the trial before the police justice the coupon directed by the circuit court's order to be given to each purchaser of a ticket was presented, showing that in the particular case in which an offense was charged the defendant Wood was acting under the orders of the Circuit Court of the United States, and, instead of that being regarded as a defense, it was ignored or used as evidence of guilt. The result was his sentence to a term of thirty days' imprisonment, to be worked out upon the public roads of Buncombe county, North Carolina.

The case at bar arises out of his application to the United States Circuit Court for a discharge on a writ of *habeas corpus* from the custody of the sheriff of Buncombe county, who was holding the prisoner with the purpose of requiring him to serve out his sentence. The United States Circuit Court discharged the prisoner. The case is here on appeal from this order. The opinion of Judge Pritchard is reported *Ex parte* Wood, 155 F. R., 190, printed in the appendix. His opinion on the motion for an interlocutory injunction is also printed in the appendix and is reported 155 F. R., 756.

Thus, by a combination of legislative, executive, and judicial departments of the State, an effort was made to inculcate into the unfortunate suitor in the United States court the doctrine of terror and surrender, which, under conditions of helplessness, has biblical endorsement as to its wisdom, but is entirely without legal sanction as to its righteousness:

> "Agree with thine adversary quickly, whiles thou art in the way with him, lest at any time the ad-

> versary deliver thee to the judge, and the judge deliver thee to the officer, and thou be cast into prison. Verily I say unto thee, thou shalt by no means come out thence till thou hast paid the uttermost farthing."

Under the conditions of this settled policy on the part of the authorities of North Carolina to pursue the company and its agents in the State courts for the alleged violation of the statutes of North Carolina, the validity of which was being inquired into in the Circuit Court of the United States, and in respect to which its interlocutory injunction was then in force, a condition of urgency was created which made it necessary, if the orders of the United States court were to have any force and effect, that that court should take steps to protect the company and its employees who were acting under that order. It was for acting in pursuance of this order that the appellee Wood was convicted and was in custody, and it was to vindicate its order, to protect its authority, and to have an orderly trial of the constitutional questions at issue that the circuit court awarded the writ of *habeas corpus* complained of on this appeal.

There was no way of meeting the State's policy of innumerable criminal prosecutions except by putting the disputed rates into effect, and thus entirely abandoning during the litigation the constitutional right which the company was asserting and the benefit of the injunction of the United States court, or else by undertaking the impracticable and impossible task of actually defending, with full detail of evidence, these innumerable prosecutions instituted simultaneously and at widely separated points in the State.

This record, therefore, does not present the case of one test case brought to determine the validity of the jurisdiction assumed by a Federal court, but a set purpose on the part of the State authorities to destroy by criminal proceedings a suitor in a Federal court unless he should abandon that forum.

It will thus be seen that the State, acting by its constituted authorities, in the manner hereinbefore recited, asserted the absolute right to have this constitutional question tried first in its own courts, notwithstanding that the Constitution and laws of the United States give the Federal courts concurrent jurisdiction; and further asserted and acted upon the purpose, by means of intimidation and coercion, exercised through its criminal laws and the imposition of enormous penalties, to force a suitor in a Federal court to surrender a right which had by that court been decreed to it and to abandon a relief to which it had by such court been judicially declared entitled.

Thus is presented the far-reaching and fundamental question whether a State can, through the agency of its criminal laws, coerce a suitor out of a Federal court to which it has the right to resort, and to which it has resorted, under the Constitution and laws of the United States, and can take the use of that suitor's property without compensation for the time between the enactment of a statute by the General Assembly of the State and the final determination of the constitutionality of the statute by the Supreme Court of the United States.

ARGUMENT.

The learned judge rested the order of discharge upon two propositions: (1) that the petitioner was held in custody for an act done in pursuance of an order, process, or decree of a court of the United States; (2) upon the ground that the passenger-rate act, or at least the fourth section, prescribing the penalties for its violation, was void in and of itself, without regard to whether the rates ordained by the act were such as to deprive the Southern Railway Company of its property without due process of law.

The questions arising in this controversy are of the highest importance, and in their discussion we may be indulged in recurring to the very first principles involved in their solution.

THE FIRST QUESTION WHICH ARISES IS AS TO THE POWER OF A STATE LEGISLATURE OVER FREIGHT AND PASSENGER RATES TO BE CHARGED BY A COMMON CARRIER.

The so-called Granger cases are all reported in 94 U. S. They are:

Munn *v.* Illinois, 94 U. S., 113.
C., B. & Q. R. R. Co. *v.* Iowa, 94 U. S., 155.
Peik *v.* Chicago Ry. Co., 94 U. S., 165.
Lawrence *v.* Same, 94 U. S., 165.
C., M. & St. P. R. R. Co. *v.* Ackley, 94 U. S., 179.
W. & S. P. R. R. Co. *v.* Blake, 94 U. S., 180.
Stone *v.* Wisconsin, 94 U. S., 181.

In the first of these cases it was held that the legislature of Illinois had the right to fix the compensation to be charged by the proprietors of public grain warehouses; in the second, that the State of Iowa had the right to fix reasonable maximum rates or charges for the transportation of freight and passengers on the different railroads in Iowa; in the third, that there was a similar power in the legislature of the State of Wisconsin. In these cases it was further held that if the rate was improperly fixed the legislature and not the courts must be appealed to for a change. Substantially similar views were expressed in the other cases.

But while, in the absence of a contract, this court has never, since the Granger cases, doubted the right of a legislature, either immediately or mediately through a railroad commission, to fix rates for the transportation of passengers and property, yet the rule apparently laid down in some of the Granger cases, that there was no appeal from the fiat of a legislature or of a commission acting under its authority, was soon questioned and has been entirely abandoned.

The Fourteenth Amendment to the Constitution of the United States provides, among other things:

> "Nor shall any State deprive any person of life, liberty or property without due process of law, nor

deny to any person within its jurisdiction the equal protection of the laws."

What Mr. Justice Field said in his dissenting opinion in the case of Munn *v.* Illinois, at page 141, has by subsequent decisions of this court been established as the true meaning of the language which we have above quoted from the Fourteenth Amendment.

> "All that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received. Unless I have misread the history of the provision now incorporated into all our State constitutions, and by the Fifth and Fourteenth Amendments into our Federal Constitution, and have misunderstood the interpretation it has received, it is not thus limited in its scope, and thus impotent for good. It has a much more extended operation than either court, State or Federal, has given to it. The provision, it is to be observed, places property under the same protection as life and liberty. Except by due process of law, no State can deprive any person of either. The provision has been supposed to secure to every individual the essential conditions for the pursuit of happiness; and for that reason has not been heretofore, and should never be, construed in any narrow or restricted sense.
>
> "No State 'shall deprive any person of life, liberty, or property without due process of law,' says the Fourteenth Amendment to the Constitution. By the term 'life,' as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world.

The deprivation not only of life, but of whatever God has given to every one with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision.

"By the term 'liberty,' as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment.

"The same liberal construction which is required for the protection of life and liberty, in all particulars in which life and liberty are of any value, should be applied to the protection of private property. If the legislature of a State, under pretense of providing for the public good, or for any other reason, can determine, against the consent of the owner, the uses to which private property shall be devoted, or the prices which the owner shall receive for its uses, it can deprive him of the property as completely as by a special act for its confiscation or destruction. If, for instance, the owner is prohibited from using his building for the purposes for which it was designed, it is of little consequence that he is permitted to retain the title and possession; or, if he is compelled to take as compensation for its use less than the expenses to which he is subjected by its ownership, he is, for all practical purposes, deprived of the property, as effectually as if the legislature had ordered his forcible dispossession."

In Railroad Commission Cases, 116 U. S., 307, the Chief Justice, in delivering the opinion of the court, said:

"From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent

> of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

It may be true that in such cases as Dow *v.* Beidelman, 125 U. S., 680, opinion by Mr. Justice Gray, and Budd *v.* New York, 143 U. S., 517, opinion by Mr. Justice Blatchford, there may be found a disposition to adhere to the extreme doctrine of the Granger cases, where rates have been fixed by direct legislative enactment. But to the contrary it has been established by a long line of cases, beginning with C., M. & St. P. R. R. Co. *v.* Minnesota, 134 U. S., 418, and running through Reagan *v.* Farmers' Loan & Trust Company, 154 U. S., 362; Covington Turnpike *v.* Sandford, 164 U. S., 578; Smyth *v.* Ames, 169 U. S., 466; C., M. & St. P. Ry. *v.* Tompkins, 176 U. S., 167; Prout *v.* Starr, 188 U. S., 537, that whether rates to be charged by a common carrier are fixed immediately by a legislature, or mediately through a commission deriving its authority from the legislature, such rates are not binding upon a carrier if they are such as deprive such carrier of his property without due process of law; and it is thoroughly established that "all that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession."

We may therefore assume that there is no difference of opinion upon this first proposition, viz., that the Fourteenth Amendment to the Constitution of the United States prohibits the legislature of a State from either directly or indirectly so fixing the compensation which may be charged by a carrier as to deprive it of a just compensation for the use of its property. All laws and orders of this kind are void because they are in conflict with the Constitution of the United States.

THE NEXT PROPOSITION IS THAT SUCH A LAW OR ORDER DOES NOT SPEAK WITH FINAL AND ABSOLUTELY AUTHORITATIVE FORCE.

The carrier affected thereby has the right to challenge it and call in question its force and validity. This being true, it is obvious that if such an act were to declare upon its face that it should go without challenge, that much at least of the act would be in contravention of the supreme law.

Chicago, M., &c., Ry. Co. *v.* Minnesota, 134 U. S., 458.

There being a right guaranteed by the supreme law of a judicial review of such acts of the legislature, it would be obviously beyond the competency of the legislature to say that there should be no judicial review.

In Smyth *v.* Ames, 169 U. S., at p. 527, Mr. Justice Harlan said:

> " * * * But, despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a State enactment is in harmony with that law simply because the legislature of the State has declared such to be the case; for that would make the State legislature the final judge of the validity of its enactments, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding (article 6). The idea that any legislature, State or Federal, can conclusively determine for the people and for the courts that which it enacts into the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our

institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

IT BEING THUS MADE PLAIN THAT THERE IS A RIGHT OF JUDICIAL REVIEW, WHAT MUST BE ITS CHARACTER?

Thus far this court has decided no case in which it has been authoritatively determined what must be the opportunity for judicial review to be afforded to the person affected by such an act. There have, however, been suggestions as to what should be the character of this judicial review, and there have been precedents established determining what methods are allowable in the absence of positive enactment.

In the argument of Mr. Benjamin F. Tracy for the plaintiff in error, at page 523 of Budd *v.* New York, 143 U. S., the point is distinctly made that a law exercising the function of the State to control prices charged by common carriers and others subject to the like regulation, to the end that their charges may be reasonable, must provide judicial forms and judicial machinery for the determination of the question, or at least must leave the question open for examination in the courts, and that an attempt to regulate rates without providing judicial machinery deprives the constituted courts of necessary jurisdiction and is unconstitutional and void.

In C., M. & St. P. Ry. *v.* Minnesota, 134 U. S., 418, the opinion of the court, delivered by Mr. Justice Blatchford, held that where the statute of the State withheld a judicial

review, such statute was void. The concurring opinion of Mr. Justice Miller made this suggestion:

> "That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature, or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered."

The mode of judicial review commonly employed is the one thus described, and we need only refer to the cases of Reagan *v.* Farmers' Loan & Trust Company, 154 U. S., 362; Smyth *v.* Ames, 169 U. S., 466; C., M. & St. P. Ry. Co. *v.* Tompkins, 176 U. S., 167, to establish this.

In the Reagan and the Tompkins cases the rates were fixed by a commission; in the Smyth case they were fixed directly by the legislature.

AS A STATE CANNOT CUT OFF THIS JUDICIAL REVIEW DIRECTLY, SO IT CANNOT DO SO INDIRECTLY. IT CANNOT GIVE A RIGHT OF JUDICIAL REVIEW IN FORM AND DENY IT IN SUBSTANCE.

In Cummings *v.* The State of Missouri, 4 Wallace, 277, 324, Mr. Justice Field, in delivering the opinion of the court, said:

> "If the clauses of the second article of the Constitution of Missouri, to which we have referred, had in terms declared that Mr. Cummings was guilty, or should be held guilty, of having been in armed hostility to the United States or of having entered that State to avoid being enrolled or drafted into the military service of the United States, and, therefore, should be deprived of the right to preach as a priest of the Catholic Church, or to teach in any institution

> of learning, there could be no question that the clauses would constitute a bill of attainder within the meaning of the Federal Constitution."

Again the court said:

> "The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the law-maker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

To similar purport are the observations of Chief Justice Taney. In Bronson *v.* Kinzie, 1 Howard, 310, the question before this court was whether an act of the Illinois legislature, passed subsequent to the execution of a mortgage, giving a period of redemption for one year and preventing any sale unless two-thirds of the amount at which the property had been valued by appraisers shall be paid therefor, is a law impairing the obligation of a contract. The court held that it was.

Chief Justice Taney, in delivering the opinion of the court, said (p. 317):

> "It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of a contract, and the rights of a party

> under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it."

After quoting an extract from Blackstone, the court said:

> "We have quoted the entire paragraph because it shows, in a few plain words, and illustrates by a familiar example, the connection of the remedy with the right. It is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which the clause in the Constitution now in question mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life. It was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the Constitution of the United States. And it would but ill become this court, under any circumstances, to depart from the plain meaning of the words used, and to sanction a distinction between the right and the remedy, which would render this provision illusive and nugatory; mere words of form, affording no protection, and producing no practical result."

Neither of these North Carolina statutes in terms cut off the right of a judicial review. If we assume that the defendants, the North Carolina Corporation Commission and

the Attorney General and the Assistant Attorney General, are, by the statutes of North Carolina, given such power and duties in respect to the passenger and freight law as were conferred upon the Railroad Commission and the Attorney General of Texas in the Reagan case, or the Board of Transportation in the Smyth *v.* Ames case, then it is plain that the Southern Railway Company had the right to apply the appropriate remedy, namely, a bill in equity.

Assuming, as we have said, for the sake of argument, that the defendants here occupy the same (or at least as great a) relation to the laws whose validity is challenged as did the defendants in the other two cases which we have above mentioned, we find that the complainant, the Southern Railway Company, is a citizen of the State of Virginia; that the defendants are all citizens of North Carolina, and that the suit is one arising under the Constitution of the United States and involving more than $2,000. We have, then, a clear case for a Circuit Court of the United States which by the acts of Congress has been given jurisdiction to entertain this suit. The Constitution of the United States (article 3, sections 1 and 2) provides:

> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."
>
> "The judicial power shall extend to all cases in law and equity, arising under this Constitution and to controversies between citizens of different States."

And the act of Congress ~~of March 3, 1875, 18~~ 23 Stat. ~~170~~ 434 C 866 ~~c. 137~~, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," provides as follows:

> "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at

> common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, * * * or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid."

This, now, is a case in equity. The circuit court, whose jurisdiction was invoked, has vested in it the judicial power of the United States in this case in equity, arising, as it does, under the Constitution of the United States, and involving, as it does, a controversy between citizens of different States.

What, then, is this judicial power which the Constitution of the United States has conferred upon the Supreme Court of the United States and such courts as Congress may from time to time ordain and establish? In other words, what is the judicial power of the circuit court of the United States sitting in equity and determining a cause over which it has jurisdiction? Jurisdiction is the right to hear a case. Judicial power is exercised in the case over which the court has jurisdiction, and is the power to hear and determine and carry into effect the determination. Now, the judicial power of a court of equity under a bill asking an injunction includes the right to grant an interlocutory as well as final relief. The judicial power is just as potent to grant the one kind of relief as the other kind of relief.

A circuit court of the United States having jurisdiction of a case has all the judicial power of a court of equity, if the case be one in which equitable relief is appropriately sought.

In Russell *v.* Farley, 105 U. S., 433, the power of the court of equity on the subject of interlocutory injunctions is ably discussed by Mr. Justice Bradley. The court there pointed out that it is competent for a court of equity to grant an interlocutory injunction upon such terms as seem to it discreet. As it can grant or withhold such a remedy, so also it can grant the remedy upon such terms for the

protection of the defendants by the complainants as it may see fit to impose. Pending the cause, it can relieve against the terms so imposed. So also the Federal court in equity can, where it has granted an interlocutory injunction, dissolve the same at the hearing and cause its reinstatement pending the appeal. This was done in the notable case of Cotting *v.* Kansas City Stock Yards Company, 183 U. S., 79, and is embraced in equity rule 93.

Strangely enough, it is asserted that the operation of a State law cannot be suspended by the order of a Federal court. It is difficult to understand what is meant by this. If a law of a State or of Congress is contrary to the Constitution, it is no law at all. It can be declared to be no law by the action of any judicial tribunal having authority to determine the matter. But it is said that a State law cannot be declared void except by a determination of a court of final jurisdiction. Again, it is difficult to understand what is meant by this. Surely the court of first instance, in which the law is challenged as unconstitutional, has the same right to declare it to be a void law or no law at all as has the court of ultimate jurisdiction. The judgment of one may not be as final as the other. But to say that a court of first instance cannot declare a law unconstitutional is simply to say that it must decide in every case that the law is constitutional, whatever may be its own opinion on the subject, and leave to the ultimate tribunal the solution of the question. But appellate tribunals are not meant to decide matters in the first instance, but to review decisions of courts which have already passed upon the questions involved. Nor is there any difference between the judicial power of the court of equity in suspending the operation of a law by temporary injunction and declaring such law to be void by final decree.

A restraining order must be obeyed until modified.

Pokegana *v.* Klimath, 86 F. R., 538.

Ullman *v.* Ritter, 72 F. R., 1000.

In re Debs, 158 U. S., 566, arose out of the violation of an interlocutory order.

The root of this objection is a harking back to the theory, long since discarded, that a court should not declare a legislative act void because of its conflict with the Supreme law of the State, its Constitution, or that of the United States. It was once insisted that the legislature was the final judge whether its acts were in accordance with the Constitution. There was a strong disposition to regard the assumption by the courts of the authority to determine this question for themselves a mere usurpation.

There can be no doubt that the practice of suspending or holding in abeyance acts of the legislature is a most common and every-day practice of the courts.

Thus a law is assailed because it levies a tax in violation of a contract, and a bill is filed to enjoin its enforcement. A temporary injunction is constantly employed to hold matters in *statu quo.*

Bank of Ky. *v.* Stone, 88 F. R., 383.

So of a law assailed because it imposes a tax which violates the Fourteenth Amendment. The same course is pursued.

Pacific Express Co. *v.* Siebert, 44 F. R., 310.

Why is a law fixing rates any more sacred? The basis for such a law is simply this, that the public has a right to use the property of a common carrier for a reasonable compensation, which is only a qualified right in that property. What the legislature says is evidence more or less forceful of what is reasonable compensation. But this qualified right of the public is no more sacred than the complementary right of the carrier. One right or the other must prevail *pendente lite.*

Take an ordinary case. A bill is filed to enjoin a defendant from erecting a house upon a plot of ground belonging to him, because it is said its erection will interfere with

some right of the plaintiff. A temporary injunction is granted, and then either made final and an appeal taken, or dissolved and an appeal taken with an order continuing it in force pending the appeal. All this may have been done without bond. The bill is dismissed. Here, then, is a clear right suspended during the whole period of litigation.

Now, if such an absolute right as is supposed can be suspended or held in abeyance pending an inquiry into its existence and validity, the qualified right can, with equal justice, be suspended or held in abeyance.

The fact that one right may be of more importance than the other is in no way material. A small right is equally sacred with a big right. In fact, there is no such thing as a little right as contradistinguished from a big right. A right is a right.

At last it is a question of judicial power, and the judicial power of issuing temporary injunctions is as well established as the judicial power to grant final injunctions, and the judicial power of the court of first instance to issue a temporary injunction and then a permanent injunction is just as clear as that of the ultimate tribunal to determine finally the merits of the controversy. In the case at bar the terms imposed by the Circuit Court of the United States were such as to absolutely prevent any wrong or pecuniary loss to any citizen of North Carolina. The State had no pecuniary interest in the matter. The citizen who dealt with the railroad being fully protected, equity was fully accomplished.

The right and power of the court to suspend, by interlocutory decree, the operation of a statute, alleged to be unconstitutional, seems to be definitely settled by the case of Smyth *v.* Ames, 169 U. S., 466. The case of Cotting *v.* Kansas City Stock Yards Co., 183 U. S., 79, is a still more striking illustration, because here the circuit court was of opinion that the act was constitutional, and yet enjoined its enforcement pending an appeal to the Supreme Court of the United States, and this action of the circuit court was expressly approved by this court in its opinion.

THE PRINCIPLE THAT STATE STATUTES MAY BE SUSPENDED BY TEMPORARY INJUNCTION HAS BEEN FREQUENTLY APPLIED IN THE INFERIOR FEDERAL COURTS, AS IS SHOWN BY THE FOLLOWING DECISIONS.

In State *v.* Lagarde, 60 Fed., 186, it was held that a preliminary injunction would be granted to restrain a board of agriculture from instigating and instituting actions, criminal or civil, to enforce a State law regulating the sale and purity of commercial fertilizers, and this whether the statute was interpreted as giving no authority to the board in the premises, or as conferring authority in violation of the Federal constitution.

In Central Trust Co. *v.* Citizens St. R. Co., 80 Fed., 218, it was held that a suit would lie for a preliminary injunction to enjoin a district prosecuting attorney from instituting criminal proceedings under an act to amend an act to provide for the incorporation of street railroad companies and declaring in part that "it shall be unlawful for any company organized under the provisions of this act and owning, controlling, running or operating any street railroad or system of street railroads in any city having a population of 100,000 or more, according to the United States census of 1890, or any officer, agent, servant or employee of such company to demand, charge, receive or collect from any passenger upon its road or system of roads a cash fare of more than three cents for any one trip or passage upon the same, and for any violation of the provisions of this section, such company, officer, agent or employee, shall, upon conviction thereof, be fined in any sum not less than fifty dollars and not more than five hundred dollars," the statutory provision being declared to be contrary to the State constitution on the ground that it was special and local. In 82 Fed., 1, a subsequent motion to dissolve the injunction was denied, it being held that the provision was not only contrary to the constitution of the State on the ground mentioned above, but was in violation of the Federal constitution on the ground that it impaired the charter rights of the complainant.

In this case the court said (p. 226):

> "But counsel for defendants insist that, at all events, a preliminary injunction ought not to issue. They say if the defendant railroad company will obey the law, and reduce its fares to three cents, the damage prior to final hearing will be inconsiderable or nothing. But, suppose the alleged law be invalid, and suppose the defendant railroad company declines to obey it. In the Reagan case, above cited, the same argument could have been used, yet there the preliminary injunction was issued. So, also, in Lottery Co. *v.* Fitzpatrick, wherein is discussed at length the question whether or not the preliminary injunction should issue. How can the point as to the validity of the amendment of 1897 be presented on any subsequent hearing more distinctly than on this? My opinion is that, where proceedings in effect destructive of a vested property right are threatened by a defendant in official position under color of a void statute, the preliminary injunction ought to issue."

In Metropolitan Life Ins. Co. *v.* McNall, 81 Fed., 888, a temporary injunction was granted to enjoin a State superintendent of insurance from revoking the license of an insurance company to do business in the State, in a case where the statute, under which the defendant claimed to act, if it conferred such authority, was unconstitutional.

In Cobb *v.* Clough, 83 Fed., 604, a temporary injunction was granted to restrain the governor, State auditor, and treasurer as a board of land commissioners from disposing of, as school lands, lands claimed by complainants under a prior land grant, as directed by a statute alleged to be unconstitutional, and to restrain the governor, auditor and attorney general from commencing actions against the grantees of the railroad company or persons having contracts with respect to the lands, as was also directed by the statute referred to.

In Fairfield Floral Co. *v.* Bradbury, 87 Fed., 415, it was held that where an injunction is asked to restrain a Federal officer from continuing a course of action, entered upon in

pursuance of a Federal statute (in this case a local postmaster withholding letters and refusing to pay money orders under an act of Congress, claimed to be unconstitutional, relating to non-mailable matter), and the court on preliminary injunction is in doubt as to the constitutionality of the statute, a preliminary injunction will issue when it appears to be the best way of doing justice pending the final hearing.

In Union Pac. Ry. Co. *v.* Alexander, 113 Fed., 347, a preliminary injunction was granted to restrain respondents (members of the board of equalization) from transmitting to the county clerks of the State any statements of assessments made under the provisions of a State revenue act on the ground that the act was in violation of the State Constitution.

The W. J. Hingston Co. *et. al.*, 144 Fed., 560, was a case where the jurisdiction in admiralty over a certain vessel depended on the invalidity of a State law. The jurisdiction was retained pending decision as to validity of the State law, thus temporarily annulling it.

In Globe Elec. Co. *v.* Andrews *et al.*, 144 Fed., 871, a temporary injunction was granted against the enforcement of an inspection law of Wisconsin, which was held void because a regulation of interstate commerce.

In Consolidated Gas Co. *v.* Mayer, 146 Fed., 150, an injunction *pendente lite* was granted to the complainant, restraining the attorney general of New York and the district attorney from enforcing or attempting to enforce, by criminal prosecutions or otherwise, two acts of the legislature fixing the price to be charged for gas, and providing for the imposition of penalties upon any person or corporation making charges for gas in excess of the rate fixed.

In Crescent Liquor Co. *v.* Platt, 148 Fed., 894, the court held unconstitutional a West Virginia statute subjecting to criminal punishment any agent of an express company delivering intoxicating liquors and granted a temporary injunction against the express company, restraining it from complying with the statute.

THE NEXT QUESTION IS, THE CASE BEING ONE OF WHICH THE CIRCUIT COURT OF THE UNITED STATES HAD JURISDICTION, AND THE CIRCUIT COURT HAVING JUDICIAL POWER AMPLE TO JUSTIFY ITS ORDERS, WERE THE DEFENDANTS CAPABLE OF BEING SUED?

It is claimed that they were not and that the suit was against the State, and therefore a case not within the judicial power of the United States under the terms of the Eleventh Amendment. The fact that the defendants were State officers by no means proves that the suit was against the State. On the contrary, the cases which have justified the invoking of the jurisdiction by a private citizen against a State officer are so numerous in this court that it would be vain to cite any of them. For the purpose of this case, it seems to us that we need only take such cases as the Reagan case and the Smyth *v.* Ames case, with its complement, Prout *v.* Starr, and compare the statutes involved in those cases with the statutes involved here. The statute in the Reagan case is given in the report of the case. The pertinent parts of the statute in the Smyth *v.* Ames case we print in the appendix in parallel columns with the pertinent parts of the North Carolina statutes. We also call attention to the North Carolina statutes as given in the opinion of the Circuit Court, printed in the appendix. It will not do to say that a State officer has not a special duty to perform in reference to a particular enactment unless such duty is imposed in that very enactment. It is equally his special duty if it is prescribed in other enactments relative to the same subject.

In the case of Smyth *v.* Ames the act of the Nebraska legislature involved simply fixed the rates. Other statutes were looked to, and it was determined that by these other statutes the duty of enforcing observance of these rates was vested in the Board of Transportation and the Attorney General, and therefore the members of this Board of Trans-

portation and the Attorney-General were appropriate defendants. The duties enjoined upon the members of the Board of Transportation in Smyth *v.* Ames were certainly no clearer or more distinct in reference to the enactments therein than the duties enjoined upon the North Carolina Railroad Commission, the Attorney General, and the Assistant Attorney General in reference to the enactments in question in the case at bar.

In one class of cases this court has determined that a suit against the officers of a State is a suit against the State, and in another class of cases it has determined that a suit against the officers of a State is not a suit against the State.

The class of cases in which suits against State officers are regarded by this court as suits against the State are illustrated by the Louisiana and Virginia Debt cases, notable among which is the case of *In re* Ayers, 123 U. S., 443, and by the case of Fitts *v.* McGhee, 172 U. S., 516.

1. As to the distinction between such cases as the State Debt cases which are, and the cases in which suits against State officers are not, suits against the State.

The line of distinction between these two classes of cases is this: Wherever an attempt is made by means of a suit against a State officer to coerce the State into a compliance with its contract, the suit is regarded as a suit against the State, the ultimate and substantial object of the suit being regarded by the court, and it being determined that the only effect of permitting the suit would be, either directly or indirectly, to require the specific performance by the State of its contractual obligations. This class of cases is illustrated by the Louisiana and Virginia Debt cases.

In the case of *In re* Ayers, *supra,* this court says (page 502):

> "Admitting all that is claimed on the part of the complainants as to the breach of its contract on the

part of the State of Virginia by the acts of its General Assembly referred to in the bill of complaint, there is, nevertheless, no foundation in law for the relief asked. For a breach of its contract by the State it is conceded there is no remedy by suit against the State itself. This results from the Eleventh Amendment to the Constitution, which secures to the State immunity from suit by individual citizens of other States or aliens. This immunity includes not only direct actions for damages for the breach of the contract brought against the State by name, but all other actions and suits against it, whether at law or in equity. A bill in equity for the specific performance of the contract against a State by name it is admitted could not be brought. In Hagood *v.* Southern, 117 U. S., 52, it was decided that in such a bill, where the State was not nominally a party to the record, brought against its officer and agents, having no personal interest in the subject-matter of the suit, and defending only as representing the State, where 'The things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State,' the court was without jurisdiction, because it was a suit against a State.

"The converse of that proposition must be equally true, because it is contained in it; that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State. Such is the precise character of the suit in the circuit court against the petitioners in which the order was made, the violation of which constitutes the contempt for which they have been committed to the imprisonment from which they seek delivery by these writs."

Page 504:

> "But where the contract is between the individual and the State, no action will lie against the State, and any action founded upon it against defendants who are officers of the State, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the State, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution."

The court, at page 503, points out that the distinction is obvious between cases involving the contractual obligations of a State and cases in which the rights of persons and of property are invaded, or sought to be invaded, under the authority of an unconstitutional State law, the court saying, at page 506:

> "But this [referring to what has been said about enforcing directly or indirectly the contracts of a State] is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest. In respect to the latter class of cases we repeat what was said by this court in Board of Liquidation *v.* McComb, 92 U. S., 531, 541: 'A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who

will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void.' * * *

"Nothing can be interposed between the individual and the obligation he owes to the Constitution and laws of the United States, which can shield or defend him from their just authority: and the extent and limits of that authority the Government of the United States, by means of its judicial power, interprets and applies for itself. If, therefore, an individual, acting under the assumed authority of a State, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character and subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

The line of demarcation here set out has been pursued by this court throughout its decisions, and, in accordance with this distinction, this court has invariably held that where a State officer is attempting, or will attempt unless restrained by the court, to invade the property rights of a citizen, or to harass him in respect to them, by seeking to enforce against him confiscatory charges, and thus to deprive him of reasonable compensation for his property, he has no right to interpose anything between himself and the obligation he owes to the Constitution and laws of the United States; for nothing can shield or defend him from their just

authority, and in making an attempt to violate this supreme law he is stripped of his representative character. Therefore a suit against him is not a suit against the State.

Reagan *v.* Farmers Loan & Trust Co., 154 U. S., 362.
Smyth *v.* Ames, 169 U. S., 466.
Chicago, Milwaukee & St. Paul Ry. *v.* Tompkins, 176 U. S., 167.
Prout *v.* Starr, 188 U. S., 537.

This distinction has been well expressed by Justice Bradley in his dissenting opinion in the Virginia Coupon cases, the soundness of which has never been denied, although its application to the cases in which it was delivered was not conceded:

> "But, then, it will be asked, has the citizen no redress against the unconstitutional acts or laws of the State? Certainly he has. There is no difficulty on the subject. Whenever his life, liberty or property is threatened, assailed or invaded by unconstitutional acts, or by an attempt to execute unconstitutional laws, he may defend himself, in every proper way, by *habeas corpus*, by defense to prosecutions, by actions brought on his own behalf, by injunction, by mandamus. Any one of these modes of redress, suitable to his case, is open to him. A citizen cannot, in any way, be harassed, injured or destroyed by unconstitutional laws without having some legal means of resistance or redress. But this is where the State or its officers moves against *him*. The right to all these means of protection and redress against unconstitutional oppression and exaction is a very different thing from the right to coerce the State into a fulfillment of its contracts. The one is an indefeasible right, a right which cannot be taken away; the other is never a right, but may or may not be conceded by the State; and, if conceded, may be conceded on such terms as the State chooses to impose.
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> "All the cases that are cited from the books in which redress has been afforded to individuals by the courts against State action are cases arising out of

> the first class, and not out of the second; cases of State aggression, and not of refusal to fulfill obligations. The case of Osborn against The United States Bank, 9 Wheat., 737, was of that class; so was that of Dartmouth College *v.* Woodward, 4 Wheat., 518; so was that of New Jersey *v.* Wilson, 7 Cranch, 164. So, if looked at carefully, were those of Davis *v.* Gray, 16 Wall., 203, and the Board of Liquidation *v.* McComb, 92 U. S., 531; although these last cases approach nearer to suits against a State than any others which have received the sanction of this court. In all these cases the State has attempted to do some unconstitutional act injurious to the party, or some act which it had entered into a contract not to do; and redress was sought against such aggressive act; they, none of them, exhibit the case of a State declining to pay a debt or to perform an obligation, and the party seeking to enforce its performance by judicial process."
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> Virginia Coupon cases, 114 U. S., 335, 336.

In this connection, it must be noted, and it follows as a corollary, that when *an act of aggression* against property rights is attempted by an officer, he is not entitled to protection on the plea that it was discretionary with him whether or not he should inflict or attempt the injury. It is true that a court cannot require by mandamus an act to be done that is discretionary. In order to justify the issuance of a mandamus, the act to be enforced must be ministerial, and the officer must not be clothed with a discretion whether he will or will not do the act. But a court of equity will never hesitate to prevent injury to property because the person attempting to inflict it was at liberty to do or not to do it. The rights of courts of equity to intervene against the officers of a State to prevent injury to property is based upon the necessity for such action in order to prevent the threatened injury. Unquestionably an injunction would issue to prevent an individual, not an officer, from inflicting injury upon property. Such an individual could not justify on the ground that he was a free agent, and at liberty to do or not

to do the act, and when an officer undertakes to inflict the same injury, and he attempts to justify on the ground of an act which is unconstitutional, but which leaves it discretionary with him whether he will do the act or not do it, equity will only inquire whether he intended, or is attempting, to inflict the injury, and if he is, he will be restrained, notwithstanding the fact that he has a discretion in the matter. In such a case equity will not be coercing his discretion. He will have determined that discretion by the attempt to inflict the injury, and equity will interpose to prevent it, because the substantial thing that equity proposes to do is to prevent a threatened injury.

2. As to the distinction between Fitts *v.* McGhee, 172 U. S., 516, in which a suit against a State officer was considered a suit against the State, and the cases in which suits against State officers are not suits against the State.

In Fitts *v.* McGhee it was determined that none of the defendants was charged by law with any special duty in connection with the act which was claimed to be unconstitutional. There was not even a plausible pretext for any claim that either of the defendants, the Attorney General or the solicitor, was, by virtue of any State power, or otherwise, attempting, or about to attempt, to invade the property rights of the complainant by enforcing against it the provisions of an unconstitutional statute. The case therefore presented the bald contention that simply because these defendants were officers of the State, although no duty was imposed upon them by any statute which would make it certain that they would attempt and were about to attempt a trespass against the complainant's property, and although there was no basis for any assumption that in any capacity they were attempting, or about to attempt, such trespass, they were proper and sufficient defendants to a suit to test the constitutionality of

the act complained of. This follows from the fact, which the bill shows, that the indictments sought to be enjoined were found under an act not alleged to be unconstitutional. There being no unconstitutional invasion of property rights, or any attempt or purpose on the part of these defendants by virtue of an unconstitutional statute to invade a property right, nothing was left in the suit except the representative capacity of these defendants, and in that capacity they represented simply the State. Under these circumstances this court held that a suit against defendants thus related to the State and thus unrelated to any effort to unconstitutionally invade the property rights of the defendants, was in substance and effect a suit against the State. If, however, it had appeared that the Attorney General and solicitor, by virtue of power conferred upon them by the State of Alabama, would attempt or were about to attempt to invade illegally the property rights of the complainant, it could hardly be successfully contended that a court of equity, the basis of whose jurisdiction is the protection of property, would have withheld its protection from such unconstitutional invasion of property rights. The distinction therefore between the case of Fitts *v.* McGhee and that class of cases in which suits against officers of the State are by this court considered not to be suits against the State is this: That in Fitts *v.* McGhee the defendants were not attempting and were not about to attempt to invade the property rights of the complainant under the alleged authority of an unconstitutional statute. Nor was there any legislation on the part of the State of Alabama shown to the court that established such a special relation of these officers to the unconstitutional act, or that imposed upon them such positive duty in respect to it as would justify the court in concluding that they would obey the positive mandate of the statute and attempt to invade the property rights of the complainant. On the other hand, the cases which this court has considered suits against officers of a State, and not suits against the State, have

been those in which either it was shown to the court that property rights were about to be invaded under the authority of an unconstitutional act, or in which there was such positive mandate in the statutes of the State as would directly connect the defendants sued with, and justify the court in concluding that they were about to attempt, an invasion of the property rights of the complainant under the authority of an unconstitutional law.

In the case at bar this suit is justified against these defendants, both by the positive allegation of the bill that these defendants were about to invade its property rights under the color of authority contained in an unconstitutional statute and also by the statutes of North Carolina; among others, by section 1113 of the Revisal of 1905, which made it the absolute duty of the Commissioners to proceed against this complainant if it should violate any alleged laws, and made it the duty of the Attorney General and the Assistant Attorney General to take steps to make such proceedings of the Commissioners effective.

That statute is as follows:

> "The commission, whenever in its judgment any corporation has violated *any law*, shall give notice thereof in writing to such corporation, and, if the violation or neglect is continued after such notice, shall forthwith present the facts to the Attorney General, who shall take such steps thereon as he may deem expedient."

As stated before, it is not necessary that these duties be imposed by the act, the constitutionality of which is complained of. It is sufficient if they existed by virtue of any law of the State. This was held in the case of Consolidated Gas Co. v. Mayer, 146 Fed., 150, 154, where it specifically appears that the duty of the Attorney General with regard to the enforcement of the statute complained of in that case existed by virtue of his general duties, imposed by a separate and antecedent statute. This merely follows Smyth v.

Ames, 169 U. S., 466. But in the case at bar the very statutes the constitutionality of which is here complained of imposed specific duties upon the Corporation Commission in respect to them. By section 5 of the Freight act it is provided:

> "The Corporation Commission is hereby directed to prepare and publish the tariff of rates, charges and tolls to be charged and collected by railroad companies in this State, as authorized by this act, on or before July 1, 1907."

Under this requirement it was necessary for the Corporation Commission to ascertain the specific rates permitted by the act in respect to any particular road, and to publish them as required by the act.

By section 2 of the Passenger act it is provided that the North Carolina Corporation Commission shall publish the rates fixed by this act for the several railroad companies operating in this State on or before the first day of June, 1907, and by section 3 it is provided that it shall be the duty of the railroad company to keep on sale mileage books of one thousand miles, at such railroad ticket offices in the State as shall be named and designated by the Corporation Commission of North Carolina. It therefore became the duty of the Corporation Commission to classify the roads according to the general requirements and definitions of that act, and to ascertain which one of those roads was entitled, by reason of its length, or by reason of the time of its construction, or by reason of its ownership, control, or operation by some other road, to charge some particular rate, and to designate the rate in respect to such road, and to publish it, as required by the statute.

It will thus be seen that there were direct, specific, and mandatory duties incumbent upon the Corporation Commission of North Carolina, not only by virtue of the general statute above alluded to, but by virtue of these special

statutes, and that there were also special duties in respect to these statutes incumbent upon the Attorney General and the Assistant Attorney General by virtue of the statute laws of that State. All of these defendants, therefore, were much more closely related to the enforcement of the acts complained of in this case than were the official defendants in the case of Smyth *v.* Ames, where the only duties incumbent upon the Commission or the Attorney General were duties in respect to the supervision and control of railroad corporations, and the duties of the Corporation Commission of North Carolina were just as direct in respect to these matters as were the duties of the Railway Commissioners in the case of Chicago Railway Co. *v.* Dey, 35 Fed., 866, in which the duties of the commissioners were to publish the rates, and as the duties of the railroad commissioners in the case of Northern Pacific Railway Company *v.* Keyes, 91 Fed., 47, in which the duties of the commissioners were likewise to publish the rates.

It can no longer be successfully contended that the Attorney General of a State charged with special duties in respect to the enforcement of an unconstitutional statute cannot be made a party defendant to a suit and enjoined. This was done in the case of Smyth *v.* Ames, where one paragraph of the injunction approved by this court read as follows:

> "And that the Attorney General of this State be in like manner enjoined from bringing, aiding in bringing, or causing to be brought, any proceeding by way of injunction, mandamus, civil action, or indictment against said companies or either of them, or their receivers, for or on account of any action or motion on their part commanded or forbidden by the said act."
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> Smyth *v.* Ames, 169 U. S., 477.

It is true that it is said by this court in the case of Prout *v.* Starr, 188 U. S., 544, that the defendant was included in the bill in the Smyth *v.* Ames case as the Attorney General

of the State, but that was because he was one of the members of the board of transportation, which was directed to enforce the provisions of the act. It was not necessary to say this in the Prout *v.* Starr case, nor does it seem to be entirely an accurate statement of the fact, because the Attorney General was included as a defendant in the Smyth *v.* Ames case, not only as a member of the Board of Transportation, but also in his capacity as Attorney General. And in the case of Prout *v.* Starr the injunction is ordered against the Attorney General as Attorney General, and not because he was a member of the Board of Transportation. He is thereby enjoined from collecting penalties under the provisions of a statute judicially determined to be void. Suits and injunctions against the Attorney General of a State have been upheld in the recent cases of Railroad Commission of Louisiana *v.* The Texas & Pacific Co., 144 Fed., 68 (C. C. A.), and Consolidated Gas Company *v.* Mayer, 146 Fed., 150.

It is also true that in the Cotting case, 183 U. S., the Attorney General was dismissed as a party to the suit, but that was done without passing on the question, and in the later case of Prout *v.* Starr, 188 U. S., 544, the Attorney General was expressly enjoined. It can hardly be successfully contended that an Attorney General may be enjoined from bringing criminal suits against a complainant to enforce an unconstitutional law, if, in addition to being Attorney General, he is a member of the Board of Transportation, but that he cannot be enjoined from bringing such suits if he is not a member of the Board of Transportation. The substantial thing that is done is to enjoin him from invading the property rights of a complainant under the color of an unconstitutional act, and he can no more justify such invasion by the plea that he is the Attorney General of the State than he can by the plea that he is a member of the Board of Transportation.

It is, therefore, submitted that the defendants to this bill are proper defendants. That being so, the court has juris-

diction not only of the defendants, but of the whole subject and of all of the questions involved.

THE CIRCUIT COURT OF THE UNITED STATES HAVING FIRST TAKEN JURISDICTION OF THIS CONTROVERSY, IT WAS NOT COMPETENT FOR THE STATE COURTS OF NORTH CAROLINA THEREAFTER TO ASSUME CONTROL OF THE SAME.

There are many cases in this court laying down and illustrating the rule that where a suit is pending in a court of general jurisdiction involving the administration of an insolvent or trust estate or the enforcement of mortgages or other liens upon property, no other court of concurrent jurisdiction can thereafter assume control over the same controversy. This rule is not confined to cases in which the possession of property has been actually taken, as by the appointment of a receiver in the court first assuming jurisdiction, but is also extended to cases where, in order that there may be a complete settlement of the matter in dispute, the taking possession of such property will become necessary.

We need only refer to one of the late cases on this subject—Farmers Loan & Trust Company *v.* Lake Street Elevated R. R., 177 U. S., 51.

But this is not the only case in which the principle is upheld that the right to exclusive control over a matter in controversy belongs to the court first assuming jurisdiction.

The opinion of Mr. Justice Field, sitting at the circuit with Circuit Judge Sawyer and District Judge Sabin, discusses this question more at large than any other which we have been able to find (Sharon *v.* Terry, 36 F. R., 338), the discussion of this particular question being found beginning at page 354.

The facts of that particular case are well illustrative of the doctrine. William Sharon, a citizen of the State of Nevada, instituted in the Circuit Court of the United States for the District of California a suit in equity against Sarah Althea

Hill, alleging that the defendant was in the possession of a forged paper which purported to be an acknowledgment under the California statute of a marriage between the complainant and the defendant. The relief asked was that the paper should be delivered up for cancellation. After the defendant had been served in this case she brought a suit in the Superior Court of San Francisco for a divorce, claiming that the paper which was the basis of the controversy in the first case was a valid declaration of marriage between herself and the defendant; and in her suit she claimed alimony and a share in the community property which she alleged had been earned after the marriage. The case proceeded to judgment in the State court, where it was held that there had been a valid marriage between the parties, and a decree was rendered for divorce and alimony. This judgment was pleaded in the suit in the Circuit Court of the United States as conclusive of the question. Notwithstanding this plea, however, the Circuit Court of the United States examined the facts and determined that the paper was a forgery, and that there had been no marriage, and thereupon directed that the paper should be delivered up for cancellation, and that the defendant, Sarah Althea Hill, should make no claim under it.

The complainant, Sharon, died pending the submission of the cause in the Federal court. The judgment was entered *nunc pro tunc* as of the date of submission. Subsequently certain bills of revivor were filed by his executor and the trustee of Sharon's estate for the purpose of carrying into execution the decree and declaring inoperative and void the judgment in the State court. This relief was granted. The court held that the true controversy was over the validity of the paper, and that as the Federal court had first assumed jurisdiction of this controversy, it was not competent for any court of concurrent jurisdiction, by a proceeding subsequently brought, to determine the same.

The authorities are fully reviewed. The rule is said to be one of general application, subject only to two exceptions: First, where the same plaintiff has asked in the different suits a determination of the same matter; second, where the cases are upon contracts or obligations which, from their nature, are merged in the judgment rendered, the subject upon which the first suit is founded having thus ceased to exist. Neither of these exceptions need be here considered.

In the course of his opinion Mr. Justice Field quotes from Taylor *v.* Taintor, 16 Wall., 366, where this court, speaking by Mr. Justice Swayne, said (p. 370):

> "Where a State court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other until its duty is fully performed, and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is, indeed, a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function."

There can be no doubt that the purpose of the suit brought by the Southern Railway Company in the Circuit Court of the United States was to have a comprehensive decree upon the subject of the validity of the passenger and freight acts. They were challenged as unconstitutional, and the court was asked to investigate fully the matter, to the end that it might determine whether the complainant's assertion that the acts were invalid and violated its rights under the Fourteenth Amendment to the Constitution was in fact true. That being the case, it became thereafter incompetent for any other tribunal to assume jurisdiction of this very controversy. The prosecution of the Southern Railway Company or its agents under the passenger-rate law was undoubtedly the assumption by the State court of an inquiry into and a determination of the very matter which had thus been placed within the control of the Circuit Court of the United States.

We further submit that the case of Harkrader *v.* Wadley, 172 U. S., 148, fully sustains the opinion of Judge Field in the case above cited, and the contention which we are here making. Stated briefly, that case involved the question whether a suit in equity in a Federal court, in which it was claimed that Wadley had become liable to the creditors of a certain bank through the wasting of its assets, prevented the indictment of Wadley in a State court for the crime of embezzling the funds of the same bank. This court held that it did not; that the matters in issue were not at all the same. Among other cases cited by the court is that of Mayor of York *v.* Pilkington, 2 Atkins, 302. In the cited case the plaintiffs, in a chancery bill and cross-bill to establish in equity their sole right of fishing in a certain stream, while their bill was still pending, caused the defendant to be indicted in the York Criminal Court for a breach of the peace for such fishing. Lord Hardwicke awarded an injunction to restrain the plaintiff from all further criminal proceedings in other courts. In this Atkins case the controversy was over the right of fishing. This was the subject of inquiry in the bill in equity, and Lord Hardwicke held that the jurisdiction of that court would be maintained as exclusive, even against an indictment subsequently found. There seems to us to be a perfect analogy between that case and the one at bar.

The Supreme Court in the Harkrader case, goes on to point out that the fallacy in the argument of Wadley was the assumption that the same right was involved in the criminal case in the State court and in the equity case pending in the Federal court. The court stated that it was obvious that the civil liability of Wadley to indemnify the plaintiffs in the equity suit, by reason of losses occasioned by his misconduct as an officer of the bank, was another and a very different question from his criminal liability to the Commonwealth of Virginia for embezzlement of funds in the bank.

> "There might well be different conclusions reached in the two courts. A jury in the criminal case might properly enough conclude that, however foolish and unjustifiable the defendant's conduct may have been, he was not guilty of intentional wrong. The court in the equity case might rule that the defendant's disregard of the ordinary rules of common sense and management was so flagrant as to create a civil liability to those thereby injured without viewing him as a criminal worthy of imprisonment."

The court further said, in reference to enjoining the attorney of the Commonwealth of Virginia from prosecuting the indictment for embezzlement, that no case could be found where an injunction against a State officer had been upheld where it was conceded that such officer was proceeding under a valid State statute.

We submit that the reasoning of Mr. Justice Shiras, in delivering the opinion in the case of Harkrader *v.* Wadley, entirely justifies our position in the case at bar. The sole question in the Circuit Court of the United States, where the bill in equity was filed, and in the State court, where the warrant against Wood was issued, was the validity of the passenger-rate statute. If that statute was valid, it would result in a dismissal of the bill in equity. On the contrary, if the complainant, the Southern Railway Company, was right in its contention in the case in the Circuit Court of the United States, that the passenger-rate act was invalid, the indictment in the State court must necessarily fall. There was absolutely no difference between the issues in the two cases.

And we submit that such is declared to be the opinion of this court by what it said through the same justice in Prout *v.* Starr, 188 U. S., 537. That was one of the cases, it will be remembered, dealt with in Smyth *v.* Ames. The Attorney General of Nebraska, pending the suit in the United States Circuit Court, had brought an action against one of the complainant railroads for penalties. The further

prosecution of this action was enjoined. At the conclusion of its opinion this court said:

> "Several changes of incumbents in the office of Attorney General took place while the cases were proceeded in, but that did not deprive the court of jurisdiction. The successors in office were duly substituted and thus became subjected to the preliminary and final decrees of the court. The object of the supplemental bill was to restrain the present appellant, as successor to Smyth, from attempting to transfer the very matters which stood for judgment in the Federal court to the State court by filing a bill in the latter. Such a course might bring about a conflict between those courts and create the confusion so often deprecated by this court (Peck *v.* Jenness, 7 How., 612, 625; Chittenden *v.* Brewster, 2 Wall., 191; Orton *v.* Smith, 18 How., 263).
>
> "The jurisdiction of the circuit court could not be defeated or impaired by the institution by one of the parties of subsequent proceedings, whether civil or criminal, involving the same legal questions in the state court (Harkrader *v.* Wadley, 172 U. S., 148, 166)."

If the contention of the State of North Carolina is sound, that notwithstanding the assumption by the Circuit Court of the United States of jurisdiction over this controversy, and the exercise of its judicial power in issuing the interlocutory injunction, the State of North Carolina can assert in her criminal courts that the Passenger act is a valid law and those violating it subject to indictment and conviction, then exactly the same state of case will exist after a final decree should one be rendered in favor of the Complainant and after its affirmance by this Court, should it be here affirmed.

It is true that what would be said here in an opinion affirming would be a precedent. But if the contention of North Carolina is sound, it would be nothing more than a precedent.

In every indictment found there would have to be a trial and the facts shown. In every penal action brought, there would have to be the same defense. The court would no doubt tell the jury that the principles of law laid down by this court should bind them, but it would be for the jury to apply the law to the facts in each case.

In the Smyth case this court was careful to leave the case open, so that if conditions changed, there might be a revision of the decree. But all this, under the contention of the North Carolina authorities, was quite useless. If conditions changed, the carrier could be indicted, and, the facts proved at the trial not being the same, its conviction could easily follow.

To restate the matter, the contention of the State that, although the Fourteenth Amendment to the Constitution of the United States prohibits a State from depriving, in any manner, a person of his property without due process of law, it can do so through the medium of its criminal laws, and that no court of the United States can issue an injunction to prevent it, thus logically and inevitably raises the further question, whether, if the injunction granted by the Circuit Court of the United States is affirmed by the Supreme Court of the United States, the State will still have the power to deprive the complainant of the benefit of that injunction, and to still continue to harass and punish it under the terms of these criminal statutes.

THE NEXT QUESTION IS, CAN A CARRIER BE PROTECTED BY A DECREE IN A COURT OF EQUITY FROM CRIMINAL AS WELL AS CIVIL HARASSMENT UNDER A VOID STATUTE?

In Davis & Farnum Mfg. Co. *v.* Los Angeles, 189 U. S., 207, 218, this court said:

> "It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitu-

> tional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding."

Again, in Dobbins *v.* Los Angeles, 195 U. S., 223, 241, this court said:

> "It is well settled that where property rights will be destroyed unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity (Davis & Farnum Mfg. Co. *v.* Los Angeles, 189 U. S., 207, 218, and cases therein cited)."

In the case of Reagan *v.* Farmers' Loan and Trust Co., the injunction prohibited John H. Reagan and others, acting as the Railroad Commission of Texas, and Charles A. Culberson, acting as the Attorney General of the State of Texas, and his successors in office, from instituting, or authorizing, or directing any suit or suits, action or actions, against the defendant railroad company for the recovery of any penalties under and by virtue of the provisions of the act of the Legislature of the State of Texas approved April 3, 1891.

Section 14 of that act made any railroad company and its agent and officer violating the provisions of the act guilty of extortion, and provided that they should forfeit and pay to the State of Texas a sum of not less than one hundred nor more than five thousand dollars. Sections 15 and 16 created similar offenses against the State. The defendants in that case, including the Attorney General, were enjoined from enforcing these penalties.

The final decree in Smyth *v.* Ames, which was affirmed by the Supreme Court, is given in the report of that case (169 U. S., 476). We make an extract therefrom, observing that the words in italics were by the court directed to be struck out. This shows that this court approved the decree

prohibiting criminal proceedings or proceedings by way of indictment, as well as civil proceedings or proceedings by way of civil action.

> "And that the Board of Transportation of said State and the members and secretaries of said board be in like manner perpetually enjoined and restrained from entertaining, hearing or determining any complaint to it against said railway companies or any or either of them *or their receivers*, for or on account of any act or thing by either of said companies or their receivers, their officers, agents, servants or employees, done, suffered or omitted, which may be forbidden or commanded by said alleged act, and from instituting or prosecuting or causing to be instituted or prosecuted any action or proceeding, civil or criminal, against either of said companies or their receivers for any act or thing done, suffered or omitted, which may be forbidden or commanded by said act, *and particularly from reducing its present rates of charges for transportation of freight to those prescribed in said act*, and that the Attorney General of this State be in like manner enjoined from bringing, aiding in bringing, or causing to be brought, any proceeding by way of injunction, mandamus, civil action or indictment against said companies or either of them or their receivers for or on account of any action or omission on their part commanded or forbidden by the said act."

To the general principle that a court of equity will not entertain a bill to restrain criminal prosecutions as such, recognized exceptions have been made. A familiar one, which seems to be as old as the rule itself, is that recognized in the case of *In re* Sawyer, 124 U. S., 200, where Justice Gray said for the court, at page 211:

> "The modern decisions in England by many equity judges concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there (Attorney General *v.* Cleaver, 18 Ves.,

> 211, 220; Turner *v.* Turner, 15 Jurist, 218; Saull *v.* Browne, L. R., 10 Ch., 64; Kerr *v.* Preston, 6 Ch. D., 463)."

The exception referred to by the court is a conspicuous one. But sometimes courts in stating exceptions to a rule use general language, which, if taken literally, would exclude other exceptions less frequently occurring.

In Turner *v.* Turner, referred to, suit had been instituted for the administration of the estate of William Turner, and an injunction had been issued restraining the defendant, W. S. Merywether, and Mary Ann, his wife, from carrying on an action of ejectment for recovery of any part of the lands and hereditaments of the decedent. Under an order of the court, a solicitor went with workmen to pull down the house. The solicitor entered the house by force, and had the workmen tear it down; whereupon Merywether preferred a bill of indictment against the solicitor and his agents for forcibly entering and expelling him from the house. Thereafter one of the parties to the case presented a petition for an injunction restraining Merywether from prosecuting the indictment. The court without hesitation issued an order restraining the respondent, Lord Cranforth, V. C., saying:

> "I shall certainly make an order restraining Mr. Merywether from prosecuting the indictment. The distinction is very intelligible: this court has no jurisdiction over an indictment in general, as over a mere civil proceeding, but this is merely with reference to its own jurisdiction. If the court makes an order to which all parties consent, or by which all parties must be considered as bound, and then any party chooses to obstruct the parties executing it, the court will certainly prevent him from proceeding against the officer of the court for doing that which he would have been punished by the court for not doing."

The foundation of this exception is the fact that the court has taken jurisdiction of the subject-matter, and will not

allow this jurisdiction to be obstructed by proceedings elsewhere, which would tend to interfere with or defeat such jurisdiction by harassing parties to the suit, or to obstruct the orders of the court.

In Mr. Justice Field's concurring opinion in the Sawyer case, *supra*, another exception is suggested. He says:

> "In many cases proceedings criminal in their character, taken by individuals or organized bodies of men, tending, if carried out, to despoil one of his property or other rights, may be enjoined by a court of equity."

In Springhead Spinning Company *v.* Riley, L. R., 6 Eq., 558, Vice-Chancellor Malins held that—

> "The jurisdiction of this court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate, destruction of property, or to make it less valuable or comfortable for use or occupation."

The exception referred to by Justice Field, namely, that a bill in equity is sustainable where it seeks to prevent irreparable injury to property rights of the petitioner or complainant, has also been recognized by many courts of the United States, both State and Federal. The function of courts of equity is primarily the protection of rights of property, and though a court of equity will not ordinarily interfere to prevent criminal proceedings, even though there be an incidental injury to pecuniary interests, yet it would seem upon principle that preventive relief should be granted where the effect of the proceedings is primarily and essentially an injury to property, although such proceedings be instituted in the name of the State and be penal or criminal in character. The authorities sustain this principle.

In Schandler Bottling Co. *v.* Welch (C. C., Dist. Kan.), 42 Fed., 561, complainant applied for an injunction against

the county attorney of Shawnee county, Kansas, the sheriff of said county, and their officers and deputies, to restrain them from instituting or prosecuting civil or criminal actions against the complainant's agents for selling liquor in the original package shipped from other States, or otherwise attempting to enforce the Kansas prohibition law. The court declared that the general rule that courts of equity may not restrain criminal proceedings has its exceptions, and said:

> "One of these is where a threatened criminal proceeding is hostile, vexatious and unwarranted, and involves the wanton destruction of or injury to property interests of the accused; and especially so under circumstances where, if permitted to proceed, the party injured would have no adequate remedy at law for restitution."

Numerous cases are referred to in support of this principle, and the temporary writ of injunction was granted.

In Central Trust Company *v.* Citizens' Street Railroad Co. (C. C., D. Ind.), 80 Fed., 218, a motion for a preliminary injunction was made by complainant against the street railroad company and the prosecuting attorney for the district to restrain the respondents from attempting to enforce an act of Indiana requiring passengers to be carried by the railroad company at a certain fare, and requiring the company to issue transfers under certain circumstances, under pain of being ousted from the highways and being subjected to fines. The court issued the injunction as prayed, saying, per Showalter, C. J.:

> "Counsel urge that this bill does not show a cause of action cognizable in chancery against Mr. Wiltsie, the district attorney, since its purpose is to restrain him from instituting criminal prosecutions under color of the amendment of 1897. But this complainant is seeking to protect a *property right*, and it seems to be law that, when such prosecutions are

> threatened under color of an invalid statute for the purpose of compelling the relinquishment of a *property right*, the remedy in chancery is available." Citing the Reagan case, 154 U. S.

So, in Los Angeles City Water Co. *v.* City of Los Angeles (C. C., S. D. Cal.), 103 Fed., 711, the complainant filed a bill in equity to annul an ordinance of the city establishing rates the complainant might charge for water, in which cause the complainant afterwards filed a supplemental bill making certain consumers of water parties, seeking an injunction against the city and the consumers from enforcing the ordinance. Under the ordinance and the statutes and Constitution of the State, suits might be brought to forfeit the water works to the city, and criminal suits were also provided for. The court granted the injunction, saying, at page 738:

> "If the ordinance be void, and the defendant city, notwithstanding, threatens to, and, unless restrained by the court, will proceed to enforce its penal provisions, including those contained in it and in the Constitution and statutes of California, for the forfeiture to the city of the water works in question should the complainant charge other rates than those therein prescribed, and otherwise dispossess the complainant of the property, nothing can be plainer than that a court of equity ought to restrain the city, and its power to do so is quite clear. * * * And if, as is alleged, certain of the water consumers, acting under such statutory provisions and under the same provisions of the ordinance in question, threaten to, and will, unless restrained, commence similar suits for the forfeiture of the works to the city, and *criminal suits* against the complainant and those acting for it, as provided in the ordinance, ought not a court of equity to restrain them also? Undoubtedly so."

In Southern Express Co. *v.* Mayor, etc., of Ensley (C. C., N. D. Ala.), 116 Fed., 756, a bill was brought by the complainant to enjoin the enforcement of an ordinance exacting

a license fee, the violation of which was punishable criminally, against the city and the municipal authorities. The defendants contended that the court had no power to enjoin criminal proceedings, but Judge Jones issued the injunction, saying, at page 760:

> "The reason of the rule forbidding a court of equity to stay criminal proceedings can never apply in any degree to any prosecution in the criminal courts, unless the crime or offense for which the offender is prosecuted is created by some valid law or ordinance, or by laws or ordinances whose invalidity is doubtful and has not been pronounced by the courts of final resort." * * *

Again, on page 762:

> "It is settled that a court of equity should enjoin the enforcement of a municipal ordinance, though violations of it are punished criminally, when its enforcement will effect the illegal destruction of, or a grave interference with, a *corporate franchise*, in the operation of which the public have an interest."

Bills to enjoin criminal prosecutions where property rights or the integrity of corporate franchises were threatened by such prosecutions have been sustained by the courts in a number of States; for example, in Georgia, Alabama, Colorado, New York, Maryland, Indiana, Texas, and Kentucky. We shall now refer to some of these decisions.

In Gould & Company *v.* Mayor and Town Council of the City of Atlanta, 55 Ga., 678, the complainant company sought an injunction against the municipal authorities from enforcing an ordinance, by criminal prosecution or otherwise, requiring the payment of license fees to be made within an hour after they accrued, under pain of certain penalties. The court granted the injunction. This case was followed in the case of City of Atlanta *v.* Gate City Gas Light Company, 71 Ga., 106, where the gas company prayed for an injunction against the city, its mayor, and its engineer,

restraining them from interfering, by arrest or otherwise, with the complainant in laying down its pipes, under an ordinance of the city giving the authorities power to arrest and punish any one obstructing or interfering with the streets. The company claimed that it had the right under its charter to lay its pipes in the streets. The court issued the injunction, saying, at page 126:

> "That injunction was the proper remedy to restrain the defendants from interfering with and hindering the prosecution of the complainant's work under its charter is evident, both upon principle and authority. While a court of equity will not interfere by injunction with the prosecution of a criminal proceeding, yet, where it is evident that *private property and civil rights* are invaded by such means, equity will interfere to protect them. 'If the charge be of a criminal nature, or offense against the public, and does not touch the enjoyment of property, then a court of equity should not interpose by injunction.' On the other hand, where it is manifest, as in this case, that a prosecution and arrest is threatened for an alleged violation of city ordinances for the sole purpose of preventing the exercise of civil rights conferred directly by law, injunction is a proper remedy to prevent injury to the party thus menaced (33 Ga. R., 601)."

In Georgia Railroad & Banking Co. *v.* City of Atlanta, 118 Ga., 486, the railroad company sought an injunction against the city to prevent it from interfering with its erection of a fence on what it claimed to be its right of way, and from prosecuting it for obstructing the streets by such fence. The lower court refused to grant the injunction, but the Supreme Court reversed the decision, saying:

> "The city insists, however, that the refusal to grant the injunction was proper, since equity will not interfere with the enforcement of criminal laws, nor aid or obstruct criminal courts in the exercise of their jurisdiction. * * * But that principle in no way

> deprives a court of equity of its power to protect *private property*, nor ousts chancery of its jurisdiction over nuisances and trespasses, nor prevents the grant of injunctions against threatened or existing wrongs, nor defeats its power to enjoin a continuing injury to property or business."

The court rested its decision on the ruling in the City of Atlanta case, 71 Ga., 126, already cited.

In Port of Mobile *v.* Louisville & Nashville R. Co., 84 Ala., 115, the Railroad Company filed a bill against the city to enjoin the enforcement of an ordinance making it unlawful for any person to load or unload cars in the streets, under penalty. The injunction was granted, and the judgment of the court granting the injunction was affirmed by the Supreme Court of Alabama, which declared:

> "The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of *property rights*, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights."

In Platte, etc., Milling Co. *v.* Lee, Mayor, *et al.*, 2 Col. App., 184, the city was enjoined from prosecuting the owner of a ditch for violating an ordinance requiring the ditch to be confined and reconstructed by boxing or otherwise, so as to prevent the washing away of the property along the ditch. The court declared that while courts of equity will not ordinarily issue injunctions against the prosecution of criminal cases, yet they will do so where such prosecution tends to impair vested rights and inflict irreparable injury.

In Austin *v.* Austin Cemetery Association, 87 Tex., 330, an injunction was granted against the city from criminally prosecuting the cemetery corporation for failure to observe an ordinance making it unlawful to bury bodies except in

certain places. The court in granting the injunction used the following language:

> "No one, we apprehend, without some considerable inducement, will do an act which will cause him to be arrested and prosecuted, however clear he might be in his own mind that the act constituted no violation of the criminal law. A criminal prosecution is unpleasant to all people who have due respect for the law, and almost necessarily involves inconvenience and expense. As long as the ordinance remains undisturbed it acts *in terrorem*, and practically accomplishes a prohibition against the burial of the dead within the limits of the city of Austin, save in the excepted localities. * * * But to deny a remedy in a court of equity in the case first supposed, or in the present case analogous to it, would be, we think, to disregard the fundamental principle upon which such courts are established."

The *rationale* of the decision was that the injunction was proper in order to prevent the deprivation of vested property rights.

Arrests and criminal prosecutions have been enjoined in New York in several cases. Thus in Manhattan Iron Works *v.* French, 12 Abb. (N. C.), 446, an injunction was issued against the board of police commissioners of New York, the superintendent of police, and the captain of police to prevent the arrest of the complainant or its servants, in order to stop the manufacturer's Sunday work, under a provision of the New York Penal Code. The court pointed out that if the complainant were to submit to the arrest of its servants, make defense before the magistrate, and, if convicted, sue out a writ of *habeas corpus*, its business interests would nevertheless be ruined.

In Wood *v.* City of Brooklyn, 14 Barb., 425, an injunction was granted against the city, its mayor, and its chief of police, to restrain them from enforcing the Sunday ordinance by arrest of complainant, on the ground that the

enforcement of the ordinance would break up the complainant's business.

Penalty suits brought by the authorities of the city of Baltimore were enjoined in Mayor and City Council of Baltimore *v.* Radecke, 49 Md., 217.

In Shinkle *v.* City of Covington, 83 Ky., 420, the judgment of the lower court refusing to enjoin criminal action on the part of the city was reversed by the appellate court. A city ordinance made it a misdemeanor for any one to permit his boats to remain at a certain place on the river bank. The court declared that appellant would be compelled to abandon the possession of his landing place in order to avoid the penalties of the ordinance.

The same principles are laid down in Rushville *v.* Rushville Natural Gas Company, 132 Ind., 575, and in Flaherty *v.* Fleming, 58 W. Va., 669. In the latter case, Cox, J., said:

> "It appears, however, that if a statute, concerning which an arrest or criminal prosecution is threatened, affects civil property and its enjoyment, in protecting the property right equity may properly enjoin the criminal prosecution; but in such case its interference is founded solely upon the ground of injury to property and the necessity of preserving property rights."

But, as stated above, the Supreme Court of the United States has set the question at rest in Davis & Farnum Manufacturing Company *v.* Los Angeles, 189 U. S., 207, and Dobbins *v.* Los Angeles, 195 U. S., 223. A discussion of many of the cases on this subject will be found in 129 Fed., at page 421, in Camden Interstate Railway Company *v.* City of Catlettsburg (April, 1904).

It would seem clear that in a case where an injunction is necessary, both to protect property rights and to maintain the integrity of the jurisdiction and authority of a court which has already assumed control of the subject-matter,

there should be no hesitation on the part of the court in granting an injunction to restrain criminal prosecutions.

LET US, HOWEVER, ASSUME, FOR THE SAKE OF ARGUMENT, THAT THE CIRCUIT COURT OF THE UNITED STATES HAD NO JURISDICTION OF THE BILL OF COMPLAINT OF THE SOUTHERN RAILWAY COMPANY, AND THEREFORE THE ORDER OF INJUNCTION WAS VOID.

This assumption can only be predicated upon the idea that the passenger-rate act was an enactment entirely independent of all others; that it went into effect on July 1, 1907; that prior thereto there was no one against whom the Southern Railway Company could bring a suit in order to determine its validity, and that its penalties began to accrue on the date named. In other words, let us assume that upon failure of the Southern Railway Company to reduce its passenger rate from 3¼ cents, first class, and 2¾ cents, second class, as fixed by the North Carolina Corporation Commission, to 2¼ cents, both classes, on July 1, 1907, it became at once liable thereafter to a penalty of $500 for every ticket which it should sell, and that each of its agents selling a ticket would be guilty of a misdemeanor, to be punished by a fine and imprisonment, in the discretion of the court.

Based upon these assumptions, would the passenger-rate law of North Carolina be constitutional? Of course, if such an act is finally decisive of the question of the reasonableness of the rate, no other question can be presented. But we must assume that this is not true; we must assume that the law is, as has been frequently declared by this court, that the carrier is entitled to a judicial review upon the question whether the rate fixed by the legislature is such as can, under the Fourteenth Amendment, be imposed upon the carrier. It is to be observed that the record shows that the Southern Railway Company sells about 5,000 of these tickets every day. The record does not disclose how many station agents

and conductors or other persons engaged in exacting passenger fares are employed by the company, but as the company has some 1,400 miles of railroad in North Carolina, it may fairly be assumed that there are at least 500 of such persons. This would be a very low estimate. We would therefore, on the case stated above, have the railroad itself subjected to penalties amounting to $2,500,000 per day, and 500 of its agents amenable to indictment for misdemeanor and subject to fine or imprisonment, or both, at the discretion of the court. It will be noticed that in the case at bar the agent was condemned to work on the road 30 days. This means he was to be put in stripes and in a chain gang, and made to suffer all the humiliation that this implies.

Let us assume, for the sake of argument, that it would be competent for the company, when sued by a passenger for a penalty, or for the agent when indicted, to show by evidence that the act was unconstitutional because the rate fixed was such as to deprive the Southern Railway Company of its property without due process of law. What should be the conduct of the Southern Railway Company in order to get this question raised? It is too obvious for comment that it could not afford to disregard the act. In the first place, the risk of these penalties is such that if it should turn out that the rate is not confiscatory the accumulation would in the course of a few days render the company absolutely bankrupt.

Again, the expense of the separate trials would be enormous and the procuring of the attendance of witnesses impossible. In the Tompkins case this court sent the case back in order that it might go before a thoroughly competent master before the Circuit Court should consider the questions.

But, aside from any question of pecuniary loss, it is perfectly obvious that the Southern Railway Company could not afford to allow its agents to subject themselves to the risk of being tried, convicted, and punished as felons; and if the Southern Railway Company were to be willing to allow its

agents to incur such a risk, it is out of the question to suppose that they would do so, or that they could in any sort of reason be asked to do so.

There have been three cases brought to this court in which a railroad company has endeavored to defend in a suit for a penalty for failure to comply with a passenger-rate law, such suit being brought by a private individual. These are as follows:

Dow v. Beidelman, 125 U. S., 680. This case bears on its face evidence that it was an agreed case. However that may be, it seems to us clear that in deciding it the court was under the influence of the Granger cases and had not yet reached the conclusion that a rate fixed by legislative enactment could be challenged.

The next case is *C. & G. T. R. Co. v. Wellman*, 143 U. S., 339. It is evident in this case that the court regarded the suit as a friendly one.

The last case is that of *St. Louis & San Francisco R. Co. v. Gill*, 156 U. S., 649. This was a suit by a private individual, alleging that the railway company had on five distinct occasions charged and received from him more than the maximum tariff fixed for passengers by the Legislature of Arkansas. In the course of the opinion Mr. Justice Shiras calls attention to the case of *Chicago Railway Co. v. Minnesota*, 134 U. S., 418, saying (p. 659):

> "But it will be observed that the State was represented by the Commission, and that the remedy went to the validity of the legislation as affecting the railroad company's business as a whole. It was not a suit between the company and an individual customer. Mr. Justice Miller, in his concurring opinion, said: 'Until the judiciary has been appealed to to declare the regulation made, whether by the legislature or by the Commission, voidable for unreasonableness, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals; that the proper, if not

> the only mode of judicial relief against the tariff of rates established by the legislature or by its commission is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of the court forbidding the corporation from exacting such fare as excessive, or establishing its rights to collect the rates as being within the limits of just compensation for the service rendered; that until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method; and that, in the present case, where an application is made to the Supreme Court of the State to compel the railroad companies to perform the services which their duty requires them to do for the general public, which is equivalent to establishing by judicial proceedings the reasonableness of the charges fixed by the Commission, I think the court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the Commission before granting such relief that it would have if called upon so to do by a bill in chancery.'"

He next calls attention to the case of *Chicago Railway Co. v. Wellman*, 143 U. S., 339, and in reference to that case says (p. 660):

> "But the observations of this court by Mr. Justice Brewer are very pertinent to the present case. After stating the facts of the case, he said: 'Can it be, under these circumstances, that the court erred in peremptorily refusing to instruct the jury that an act fixing a maximum rate at 2 cents per mile is unconstitutional? Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinion as a finality? Must it be declared, as a matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that

a reduction of rates will increase the amount of business, and therefore the earnings?' And referring to the following observation made by the Supreme Court of Michigan in passing upon the case: 'In the stipulation of facts or in the taking of testimony in the court below neither the Attorney General nor any other person interested for or employed in behalf of the people of the State took any part. What difference there might have been in the record had the people been represented in the court below, however, in our view of the case, is not of material inquiry.' Mr. Justice Brewer added: 'We think there is much in the suggestion. The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature so to enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between parties. It was never thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act. * * * Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be not to declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts.'"

Again the court says (p. 666):

"Sometimes in acting on this subject the State legislatures have created commissions or boards of public

works, with power to establish rates for the transportation of passengers and freight, and in such instances the course recommended by Mr. Justice Miller, already cited, may well be followed; that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity or some equivalent proceeding, wherein the rights of the public as well as those of the company complaining can be protected. But there are other cases, and the present is one, where the legislatures choose to act directly on the subject by themselves establishing a tariff of rates and prescribing penalties. In such cases there is no opportunity to resort to a compendious remedy, such as a proceeding in equity, because there is no public functionary or commission which can be made to respond, and therefore, if the companies are to have any relief, it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties. However, we have seen that in the present case the evidence failed, in that it was restricted to a part only of the railroad, and that even if the evidence could be understood as applicable to the entire line in Arkansas, there was no finding of the facts necessary to justify the courts in overthrowing the statutory rates as unreasonable, but that, on the contrary, the company's case depended on allegations admitted by the demurrer of a party who, in no adequate sense, represented the public; and, upon the whole, we do not feel warranted, by all that appears in this record, in declaring invalid an act of the legislature of Arkansas, which, on its face, appears to be a legitimate exercise of power, and which has not been shown by clear and satisfactory evidence, to operate unjustly and unreasonably, in a constitutional sense, against the plaintiff in error. The judgment of the Supreme Court of Arkansas is accordingly affirmed."

Especial attention should be called to this sentence: "The company's case depended on allegations admitted by the demurrer of a party who, in no adequate sense, represented the public." It would possibly be going too far to say that

this court has held that a rate fixed by the legislature cannot be challenged as confiscatory in a suit brought by a private individual for a penalty incurred by a violation of the act. We know of no case in which such defense has been attempted to be made to an indictment. It is, however, obvious that the difficulty encountered in making such a defense either to a penal action or to an indictment is so great as not to constitute due process of law. Indeed, we may say that if it is the law that a State may pass an act fixing a passenger or freight rate and prescribing penalties to be enforced, civilly and criminally, for its violation, and there is no other means of judicial review, the carrier is without remedy.

We are, then, back again to the doctrine laid down by Justice Field in the Cummings case, and Chief Justice Taney in the Bronson case, and Mr. Justice Bradley in the Virginia Coupon case, that what cannot be done by direction cannot be done by indirection, and that to take away a remedy is the same exactly as to take away a right, and that a citizen cannot in any way be hastened, injured or destroyed by unconstitutional laws without having some legal means of intervenor or redress.

At least four circuit courts have decided that these penal provisions are in and of themselves void without regard to whether the rates fixed are reasonable or unreasonable. These are:

Mercantile Trust Co. v. Texas & Pac. Ry. Co., 51 F. R., 529;

Louisville & Nashville R. Co. v. McChord, 103 F. R., 216;

Consolidated Gas. Co. v. Mayor, 106 F. R., 330;

Ex parte Wood, 155 F. R., 180;

the last case being the case at bar.

In other cases it has been held that the existence of these penalties is in itself a ground of equitable jurisdiction, the remedy at law in the defense of the action for the penalties being obviously inadequate.

Thus in *Smyth v. Ames,* Mr. Justice Harlan says (p. 517):

> "In these cases the plaintiff stockholders in the corporations named ask a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the Constitution of the United States. Under the principles which in the Federal system distinguished cases in law from those in equity, the Circuit Court of the United States, sitting in equity, can make a comprehensive decree covering the whole ground of controversy, and thus avoid the multiplicity of suits that would inevitably arise under the statute. The carrier is made liable not only to individual persons for every act, matter or thing prohibited by the statute, and for every omission to do any act, matter or thing required to be done, but to a fine of from $1,000 to $5,000 for the first offense, from $5,000 to $10,000 for the second offense, from $10,000 to $20,000 for the third offense, and $25,000 for every subsequent offense. The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency, and determine, once and for all and without a multiplicity of suits, matters that affect, not simply individuals, but the interest of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi public corporation by which such highway is maintained."

In Bank of Kentucky *v.* Stone, 88 F. R., 383, the opinion of the court was delivered by Circuit Judge Taft, Harlan, Circuit Justice, and Lurton, Circuit Judge, sitting with him. The suit was one where the complainant, Bank of Kentucky, filed a bill in equity against the State Board of Valuation and Assessment of the State of Kentucky, to enjoin that Board from assessing the property of the bank under the Kentucky Act of 1892, upon the ground that that act impaired the obligation of a contract theretofore entered into between the bank and the State of Kentucky. It was objected that equity had no jurisdiction. After considering other matters, the court said (p. 390):

> "But the collecting officers are not obliged to collect the taxes by distraint; they may resort to a simple suit at law for them. In that case the bank may defend on the ground of the invalidity of the law under which the taxes have been assessed. This remedy, except where the taxes are a cloud upon real estate, would ordinarily be adequate; but, under the provisions of the revenue law of November, 1892, we do not think it is. By that law, the bank, on failing to pay the taxes assessed, according to its provisions, within thirty days after notice from the collecting officer, is subjected to a penalty of 10 per cent., and to a fine of $50 a day for every day of the delinquency, to be enforced by indictment or by civil action. It follows that the remedy of defending a suit at law for taxes under this revenue act is attended with the risk of being compelled to pay $50 a day for every day of the time necessarily consumed in the reasonable litigation of the question of the validity of the tax. By bill in equity the bank may enjoin the assessment, and pending the litigation, however long the delay, no fines or penalties can accrue against the unsuccessful litigant, because, by the terms of the act, they do not begin to accrue until 30 days after notice to pay has been given by the collecting officer. It is manifest that the remedy at law by defending a tax suit in such cases is attended with a great and oppressive burden of risk, which is absent in an action in equity. The remedy at law is there-

> fore entirely inadequate (Smyth *v.* Ames, 169 U. S., 466, 518; 18 Sup. Ct., 418; Express Co. *v.* Seibert, 44 Fed., 315."

It is to be noticed that this opinion was delivered upon the application for a temporary injunction.

In Pacific Express Company *v.* Seibert, 44 F. R., 310, a bill was filed for an injunction against the enforcement of a statute of the State of Missouri requiring a certain return from express companies and the payment of a certain tax. It was alleged that the act was unconstitutional because it laid a tax on interstate commerce and made an illegal discrimination among express companies, thus denying to the plaintiff the equal protection of the law. The bill prayed that the act of the legislature might be decreed to be unconstitutional and the defendants enjoined from enforcing the act or attempting to collect any tax or penalty therein provided for. A temporary injunction was granted on filing the bill. The case came before the court on demurrer to the bill. One of the questions raised was that the bill stated no ground of equitable relief. After pointing out that a very clear case must be made out before a Federal court would enjoin the collection of a State tax, and that if the plaintiff could pay the tax and recover the money in case the act was invalid, there could be no relief by injunction, the court said (p. 315):

> "We have not been cited to any statute or decision of the Supreme Court of the State showing that if the plaintiff paid the tax a suit would lie against the State or her officer to recover it back. In the view taken by the court of the other points in the case, the decision of this question, one way or the other, would not change the result, and the court will therefore assume, for the purposes of this case, that by the laws of Missouri an action could not be maintained to recover back a tax like this. The act we are now considering does not contemplate a suit to collect the tax. The amount of the tax cannot be known until the company makes a return of its earnings; and the

making of this return and the payment of the tax are by the provisions of the act enforced by the imposition of a penalty of $100 per day, and the denial of the right to do business in the State so long as the company is delinquent. While it is true that the plaintiff might contest the validity of the act in any suit brought by the State to collect the penalty imposed for the non-payment of the tax, that would not be an adequate remedy, for the reason that during the pendency of such a suit the penalty of $100 would be accruing each day, and the plaintiff be denied the right to carry on its business in the State. It would take months, and possibly years, to reach a final decision of the case, and, if that decision should be favorable to the State, the penalty visited on the company would be very heavy indeed, including, as it would, the penalty of $100 per day for the whole period, and the destruction of its business in the State, and probably great injury to its business in other States. Equity abhors penalties, and holds the remedy at law inadequate when the assertion of the alleged right at law will be, or may be, attended by the imposition of heavy penalties and forfeitures. And upon this ground, and because an action will not lie under the laws of Missouri to recover back the tax if paid, equity has jurisdiction in this case."

An important and illustrative case is that of State *v.* Galveston, H. & S. A. Railway Co., Supreme Court of Texas (November 7, 1906), 97 S. W. Rep., 71.

This was a suit by the State against certain railroad companies to collect taxes prescribed by an act of the legislature of the State of Texas. It was provided in the act that upon failure to pay the taxes there should be imposed a penalty of two hundred dollars for each day. The railroads resisted the payment of these taxes upon the ground that the act directing their levy was unconstitutional. It was held, however, that the act was a valid one. The court, while rendering judgment for the taxes, refused to render judment for the penalties.

The court said (p. 78):

> "The trial court denied a recovery for the penalties, prescribed by the act for a failure to pay the taxes assessed, of which ruling the State complains. Article 1, sec. 13, of the Constitution of the State declares 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishment inflicted.' The term 'fines' is synonymous with that of penalties, and the section of the Constitution applies to penalties prescribed by this act for the failure of the parties to pay the taxes. State *v.* Horgan, 55 Minn., 184; 56 N. W., 688. The declaration in the Constitution that 'fines' shall not be excessive makes it a question for the court to decide under all the facts of each particular case. In this case the penalties of $200 per day would in a year amount to $73,000. This penalty is inflicted for the detention of taxes assessed against the companies. The taxes claimed to be due from the Galveston, Harrisburg & San Antonio Railway Company would amount to $74,724 annually; so that the penalties for failure for one year to pay would be nearly 100 per cent. of that amount. The tax assessed against the Gulf, West Texas & Pacific Railway Company would amount to about $1,555 for one year, but the penalties for non-payment of this sum for a year would be $73,000, nearly 50 times as much as the amount of the tax. The assessment of a penalty of 100 per cent. for the failure to pay a tax would seem to be sufficiently excessive to authorize a court to declare it to be excessive, but the assessment of more than 4,000 per cent. upon the amount detained can leave no possible question that the penalties are out of all proportion to the amount of money detained, and the law must be held to be void for the penalties."

It is true that the invalidity of this statute on the subject of penalties was put upon the ground that the act in that respect violated the particular clause of the Constitution of Texas quoted in the opinion, but we submit that the act was

equally violative of the Fourteenth Amendment to the Constitution of the United States. In other words, if these penalties are so great as to be characterized as "excessive" fines and invalid because "excessive" the argument against their validity is even stronger when they are imposed with a view of preventing a carrier from insisting upon a right guaranteed to the carrier by the Constitution of the United States.

Besides this, there is the opinion of Mr. Justice Brewer in Cotting *v.* Goddard, 183 U. S., 92, which has been so often quoted and of which Mr. Justice Lacombe, in Consolidated Gas Co. *v.* Mayer, 146 F. R., 150, said:

> "In the case cited the judges who concur in the judgment appealed from * * * did so upon another ground, but the language of Mr. Justice Brewer, dictum though it be, commends itself as a clear and forceful exposition of the law."

This we regard as by far the most important question in this case. It is of little moment that this court shall have established it as a rule of law that a common carrier is entitled, with other citizens, to the protection of the Fourteenth Amendment; that neither Congress nor the legislature of a State can authoritatively and finally fix the amount which he is entitled to charge for the use of its property, and that on such a question it is entitled to a judicial review. If means were provided for such judicial review, but were so restricted that the carrier would be compelled to put in the rate pending an inquiry as to the validity of the act establishing the rate, it is obvious that for the time being, at least, the carrier would be deprived of its property without due process of law; for the time being, at least, its property would be taken from it without just compensation, and it would, for the time being, be denied the equal protection of the laws.

If we are correct that we had the right to pursue our remedy in equity, the court had undoubted power to grant

the interlocutory order. If we had no right to go into equity, then there were no means provided for adequate judicial review of any kind.

We submit that it is apparent from the above discussion that a State can no more violate a constitutional provision of the United States by indirection than it can do so directly.

That a State cannot directly deprive a carrier of the right of a judicial review of legislation claimed to deprive it of its property without due process of law is definitely settled by the case of Chicago, Milwaukee & St. Paul Ry. Co. *v.* Minnesota, 134 U. S., 458, where this court says:

> "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

In this case a statute of Minnesota was held to be unconstitutional, because under the construction given to it by the highest court of that State it denied to the complainant company the right to a judicial review.

It is submitted, on reason and under the authorities above given, that the destructive penalties attached to the North Carolina rate legislation not only justify the interposition of a court of equity, but render the statute itself unconstitutional, because they result in an indirect, but on that account no less potential, denial to the complainant of a judicial review, except on terms of absolute destruction in the event the complainant's contention is not sustained.

Therefore at last there arises in this case the most important question whether it is incumbent upon a State

legislature, in prescribing freight or passenger rates, to provide some means by which their effect upon the income of the carrier can be ascertained, with the view of determining whether such rates will have the effect, if enforced, of depriving the carrier of its property without due process of law.

The question arises in this case whether the imposition of penalties upon the carrier and a fine and imprisonment upon its agents for failure to observe a rate fixed by the legislature, without any previous opportunity to ascertain whether the law imposing such rates is valid or invalid, is denying to the carrier the equal protection of the laws or depriving the carrier of its property without due process of law.

THE REMEDY OF HABEAS CORPUS WAS A PROPER ONE IN THIS CASE BY REASON OF ITS URGENCY.

This proposition, we submit, is correct, whether the Circuit Court had or had not jurisdiction.

It is true that this court, in the case of Fitts *v.* McGhee, 172 U. S., indicates that in the absence of exceptional or extraordinary circumstances a person held for trial in a State court should set up in that court any defense which he has under the Constitution and laws of the United States and pursue his remedy, if necessary, by writ of error, to the highest State court and then to the Supreme Court of the United States. But it is equally true that this court has sanctioned the use of the writ of *habeas corpus* and the immediate discharge of the prisoner where exceptional or extraordinary circumstances justify it.

Familiar examples are:

Minnesota *v.* Barber, 136 U. S., 313.
Boske *v.* Comingore, 177 U. S., 459.
In re Loney, 134 U. S., 372.
In re Neagle, 135 U. S., 1.
Ohio *v.* Thomas, 173 U. S., 276.

In the case of Boske *v.* Comingore, 177 U. S., 459, above cited, the petitioner for the writ was a United States collector of internal revenue. The court said:

> "As the petitioner was an officer in the revenue service of the United States, whose presence at his post of duty was important to the public interest, and whose detention in prison by the State authorities might have interfered with the regular and orderly course of the business of the department to which he belonged, it was proper for the District Court to consider questions raised by the writ of *habeas corpus* and to discharge the petitioner if held in violation of the Constitution and laws of the United States;"

Again:

> "The present case was one of urgency, in that the appellee was an officer in the revenue service of the United States, whose presence at his post of duty was important to the public interest and whose detention in prison by the State authorities might have interfered with the regular and orderly course of the business of the department to which he belonged. The District Court, therefore, did not err in determining the question of constitutional law raised by the application for a writ of *habeas corpus* and rendering final judgment."

Again, in the case of *Ohio v. Thomas,* 173 U. S., 276, above cited, it is said (p. 284):

> "One of the grounds for making such a case as this an exception to the general rule laid down in *Ex parte Royall,* 117 U. S., 241; *Whitten v. Tomlinson,* 160 U. S., 231, and *Baker v. Grice,* 169 U. S., 284, consists in the fact that the Federal officer proceeded against in the courts of the State may, upon conviction, be imprisoned as a means of enforcing the sentence of a fine, and thus the operations of the Federal government might in the meantime be obstructed. This is such a case. In *Ex parte Royall,* it was stated by Mr. Justice Harlan, in naming some of the exceptions to the general rule there laid down,

> that 'when the petitioner is in custody by State authority for an act done or omitted to be done in pursuance of a law of the United States or of an order, process or decree of a court or judge thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission or order or sanction of any foreign State or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the General Government or the obligations of this country to or its relations with foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under State authority."

It would hardly seem necessary, after the full statement which has been made of the case at bar, to point out how exceptional and extraordinary are its circumstances.

What Wood did was done by him exactly in the manner prescribed by the order of the United States Circuit Court. His acts were strictly within the bounds of that order. If his arrest and trial by the State court could be justified, then the arrest and trial of every agent of the company in North Carolina could be likewise justified. It is too obvious for comment that such a proceeding would have entirely demoralized the service of the company.

While engaged in important matters of commerce within the boundaries of North Carolina the company was engaged in still larger matters of interstate commerce and was a carrier of United States mails. If its agents were to be arrested and held for trial for violation of the passenger act, it is quite apparent that all business of the company would soon have come to an end, not only its intrastate commerce, but its interstate commerce, and in a very brief time it must necessarily have ceased to carry United States mails or to perform

any other of the important public functions belonging to it. The fact being that a common carrier by reason of its employment is subjected to governmental regulation, by the same sign it must be true that it is entitled to governmental protection. The one is necessarily a correlative of the other.

As stated above, the remedy of *habeas corpus* should have been granted whether the Federal court had or had not jurisdiction. If the Federal court had jurisdiction, then the proceedings in the State court not only violated the order of the Federal court, not only inflicted punishment for an act done in pursuance of such order, but rendered absolutely vain and futile all the proceedings in that court.

If to the contrary the Federal court had no jurisdiction, this was because the State statute in fixing rates provided no means of judicial review and attempted to prevent any attempt at judicial review by the imposition of penalties so severe as to deter the carrier from any appeal to the courts.

In this state of case we submit the penalties are void as in and of themselves inimical to the Fourteenth Amendment. The urgency is exactly the same under either condition.

We respectfully submit that the judgment of the Circuit Court should be sustained on both grounds.

DECEMBER 17, 1907.

ALEX. P. HUMPHREY,
ALFRED P. THOM,
Of Counsel.

WALKER D. HINES,
ALEX. P. HUMPHREY,
ALFRED P. THOM, *Counsel.*

APPENDIX.

EXHIBIT A.

OPINION OF COURT ON APPLICATION FOR DISCHARGE ON WRIT OF HABEAS CORPUS.

UNITED STATES OF AMERICA,
Western District of North Carolina:

IN THE CIRCUIT COURT.

IN RE

JAS. H. WOOD, PETITIONER.

This is an application of the petitioner, Jas. H. Wood, to be discharged on a writ of *habeas corpus* from the custody of the Sheriff of Buncombe County.

The petitioner was indicted on a charge of having violated the provisions of section four of an Act passed at the session of the legislature of North Carolina of 1907, prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina, tried and convicted and sentenced to a term of thirty days' imprisonment to be worked upon the public roads of Buncombe County.

Some time since suits were instituted in the Circuit Court of the United States for the Eastern District of North Carolina by several railroad companies against the Corporation Commissioners of North Carolina, the Attorney General and the Assistant Attorney General of that State, for the purpose of obtaining protection of the Fourteenth Amendment to the Constitution of the United States against an Act of the legislature of North Carolina establishing maximum rates which such companies claimed to be confiscatory, and on a *prima facie* case, a motion was made before me for

interlocutory injunctions. Accordingly, on the 29th of June, I issued injunctions *pendente lite* enjoining the defendants and all other persons from putting the rates into effect during the inquiry before me as to the constitutionality of the same, and from instituting prosecutions or attempting to impose penalties upon the companies, or their employees, for a failure to put into effect the statutory rates which are being contested. The court amply preserved the rights of all the traveling public by requiring a coupon to be given to each purchaser evidencing the amount to be refunded to him in the event the rates should be upheld, and to secure the same ample bond and security were given. This was in accordance with the policy of the statutes of North Carolina where a rate made by the Commission is attacked. I thereupon referred the matter to a master to ascertain and report his conclusions to me, and, to avoid delay, required him in the order to make his report by the 25th of September, and fixed the hearing for the first Monday in October, so as to give the parties opportunity to have the questions involved finally determined by the Supreme Court at the earliest possible moment.

There was nothing unusual in the proceedings which were instituted before me by several railroad companies in the State. Similar suits have been instituted in the State of Alabama, where Judge Jones issued an injunction, and also in the State of Georgia, where Judge Newman pursued the same course.

Notwithstanding the United States Circuit Court had thus taken jurisdiction of the whole matter and was proceeding in an orderly way with its consideration, the evidence shows that the Governor of North Carolina has issued an address to the judges of the Superior Courts of the State, questioning the authority of the court to make the order referred to, and asking them to see that indictments against the agents and employees of the railroads and their officials be sent before the grand jury in order that the State may undertake the prosecutions which are enjoined in my order, and stating that, as chief executive of the state, he stands ready to aid them in enforcing the law. In accordance with this policy, a number of indictments have been found and prosecutions begun in defiance of the order of injunction issued by the United States Circuit Court. If these prosecutions are permitted and continued, the result will be to nullify the in-

junction which was granted by the Circuit Court, and to practically defeat its jurisdiction. Not only are the rights of litigants involved, but the dignity and authority of the Circuit Court of the United States as well. These prosecutions and arrests taking place in widely separated portions of the State, presents serious difficulties in the matter, and this court is confronted with open and avowed opposition by the powers of the State. Obstacles are being thrown in the way of inquiry by this court on writs of *habeas corpus* into the legality of arrests, and this seems to be the deliberate policy of those representing the State. I do not wish to be understood as imputing improper motives to the Governor or other State officials as respects their action in this matter. The penalties prescribed by the State statute for charging more than the statutory rates are so enormous, that if permitted to be enforced they would practically bankrupt the railroad in an exceedingly brief time and before a final hearing could be had in the cause, and thus place the complainant in a position where it would be powerless to assert the right which is guaranteed to it by the Constitution of the United States.

If the criminal prosecutions against the agents, conductors, and employees are permitted to continue, the managers of the railroads cannot successfully operate their trains, carry the mails, or continue their usefulness in interstate commerce.

The Constitution of North Carolina contains ample provision for the protection and preservation of the liberty of the citizen.

Article 1, Sec. 18, contains the following:

"Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed."

Section 21 of the same Article also provides:

"The privileges of the writ of *habeas corpus* shall not be suspended."

Section 1821 of the Revisal of North Carolina is as follows:

"Every person imprisoned or restrained of his liberty within this State, for any criminal or supposed criminal matter or on any pretense whatsoever, except in cases specified in the succeeding section, may prosecute a writ of *habeas*

corpus according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and if illegal, to be delivered therefrom."

Section 1828 of the same chapter is the only law of which I have any knowledge which imposes upon a judge a penalty for a failure to perform a judicial act. The section in question reads as follows:

"If any judge authorized by this chapter to grant writs of *habeas corpus* shall refuse to grant such writ when legally applied for, every such judge shall forfeit to the party aggrieved two thousand and five hundred dollars."

Thus it will be seen that the State Constitution of North Carolina as well as the statutory law, affords ample protection to every person who is deprived of his liberty without due process of law, and such being the case, it is remarkable that anyone representing the State should be opposed to the granting of the writ of *habeas corpus*.

Likewise, the Constitution of the United States and the Revised Statutes afford every citizen of the Union when imprisoned contrary to law, protection to the fullest extent by the writ of *habeas corpus*.

Article 1, Sec. 9, Cl. 2, of the Constitution of the United States is as follows:

"The privileges of the writ of *habeas corpus* shall not be suspended unless in cases of rebellion or invasion, the public safety may require it."

Section 751 of the Revised Statutes of the United States contains the following provisions:

"The Supreme Court and the Circuit and District Courts shall have power to issue writs of *habeas corpus*."

"The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty." (Revised Statutes, Sec. 752.)

"The court, or justice, or judge to whom such application is made shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained." (Revised Statutes, Sec. 755.)

Notwithstanding the plain provisions and enactments contained in the Constitution and Revised Statutes of the United States as well as the State Constitution and the statutes of

the State, it is seriously contended that the agents of the complainant in this instance, when indicted for the violation af the statute (the enforcement of which has been restrained by this court), are not entitled to this remedy which is afforded to every other citizen of the State.

If this policy is to prevail in North Carolina, persons who invest their money in enterprises like that of the complainant will be deprived of the means of protecting their property rights and denied the benefits of the writ of *habeas corpus* which is intended for the preservation of the liberty of every citizen.

It will be a sad day for the people of North Carolina when its citizens are prohibited by the acts of the legislature from asserting any right guaranteed to them by the Constitution of the United States. Suits of this character have been brought in different states of the Union, and in every instance the Federal courts have proceeded to determine the questions involved without interference, hindrance or delay by the legislative or judicial authorities of such states.

The equal protection of the law is guaranteed to every citizen of the United States, and I shall employ all means within the power of the court to secure to all persons who invoke the jursidiction of this court such rights to the fullest extent of the law.

If the law is construed in a spirit of fairness and impartiality there can be no conflict of jurisdiction between the state courts and the Courts of the United States.

Much has been said in regard to the power of a court of equity to enjoin the prosecution of a criminal case. In the case of Dobbins *vs.* Los Angeles, 195 U. S. 241, Mr. Justice Day, who delivered the opinion of the court, in discussing this phase of the question, said:

"It is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings, under a void law, or ordinance, may be reached and controlled by a decree of a court of equity. Davis and Farnum Mfg. Co. *vs.* Los Angeles, 189 U. S. 207-18, and cases there cited."

In this instance the Federal court has not been the aggressor, but has simply adopted the regular practice and procedure which has been approved by the Supreme Court of the United States in cases of a like nature, and while

the court is not inclined to do anything that will produce an unseemly conflict, nevertheless, it is encumbent upon it to protect the rights of the parties to this controversy and the dignity and authority of this court, and this cannot be accomplished without preserving to the fullest extent the jurisdiction of the court in determining the question which has been submitted to it for consideration.

If, in pursuing the usual and well defined practice and procedure in such cases with the sole view of maintaining the jurisdiction of this court at any stage of the proceeding, conflict must come, and I trust that it may not, I shall not evade the responsibility which is imposed upon me as the presiding officer of this court.

Much has been said about the sovereignty of the State. That question does not arise in this controversy. This court having assumed jurisdiction of the subject matter involved in the original suit, wherein the railroad companies are complainants and the railroad commissioners and others are defendants, the real question is, as to whether this court shall be denied full and complete jurisdiction of the subject matter at issue in that suit.

If the contention of the counsel representing the State be true, then, this court can be deprived of its jurisdiction by the multiplication of criminal prosecutions in the State courts against the complainant, its agents and employees to such an extent as to finally place it in a position where it will be deprived of a larger amount than that which is involved in the original controversy, and thus, by indirection, the complainant will be denied a right which is guaranteed to it by the Constitution of the United States. This proposition is inconsistent with the well established rules of judicial procedure and does not commend itself to this or any court sitting as a court of equity. It excludes the idea of comity between the courts of concurrent jurisdiction.

Suppose complainant had instituted its suit in the State court instead of applying to this court, and that court had granted an injunction in pursuance of the laws of the State, could it be seriously contended that the State court, after having taken jurisdiction of the questions involved in the civil action, thus instituted, would permit the complainant to be subjected to criminal prosecutions and suits for the recovery of the enormous penalties enumerated in the statute of the State, during the pendency of the action, and before

there could be an ascertainment as to the rights of the parties to the original suit? The Supreme Court, under such circumstances, would undoubtedly preserve the rights of the parties until the final hearing, and any other course would be without precedent in the judicial history of the State. Notwithstanding this, we are confronted with an attempt on the part of those representing the State to do that, which, if successful, would render this court powerless to grant the same relief that would be granted as a matter of course in another court of concurrent jurisdiction.

The law provides that in all cases where the Federal courts have concurrent jurisdiction with the State courts, that such courts shall have power and authority to adjudicate any question that may come before such tribunals and to protect the rights of litigants to the same extent as that of the State courts.

The suits, out of which this controversy arose, were instituted in the same manner as other suits are instituted, and, involving as they do, the validity of a statute of North Carolina, it necessarily follows that all matters connected with the enforcement of such statute, during the pendency of that suit, are under the control and jurisdiction of the court wherein the questions involved are being litigated.

The court in the original suit having assumed jurisdiction of the questions at issue in that controversy and having entered a decree wherein, among other things, the complainant and its agents, were directed to employ certain means and do certain things in respect to the sale of tickets during the pendency of that suit, the court thereby assumed control of, and dominion over, the management of the business of the complainant in so far as intrastate transportation is concerned in the same manner as if the court had appointed a receiver of the property of complainant.

As a general rule, the Circuit Courts of the United States will not issue the writ of *habeas corpus* in cases where persons are indicted and imprisoned in pursuance of a statute of a State, and it must be remembered, that this is not an attempt on the part of the State to enforce a law which has for its object the preservation of the peace, protection of the morals, or the general welfare of the public, and it cannot be insisted that these prosecutions are necessary to promote the welfare of the public in view of the fact that this court has amply protected the rights of those who may purchase tickets by

requiring the complainant to give bond amply sufficient to secure the payment of any damages that may be sustained; but, on the other hand, is a penal statute, enacted with the sole view of enforcing obedience to the first section of the act which undertakes to fix maximum passenger rates. Therefore, inasmuch as the validity of the act which prescribes passenger rates is being contested, and the court has by injunction restrained the enforcement of the same, there is every reason why this court should exercise its discretion in granting writ of *habeas corpus*, when it is apparent that prosecutions of the complainant and its agents are being instituted solely for the purpose of deterring the complainant from prosecuting its original suit.

In view of this situation, the court is called upon to determine the question whether the petitioner is entitled to be discharged, inasmuch as it appears to the court that the act, on account of which he was indicted, was committed in pursuance of an order and decree of this court.

Section 753 of the Revised Statutes of the United States is as follows:

"The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, in its custody for an act done or omitted under any legal right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

The provisions of the foregoing section are so plain that there can be no doubt as to the true intent and meaning of the same. It is provided in express terms that the writ of *habeas corpus* shall extend to one who is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof.

In the case of State *v.* Boone, 132 N. C., 1108, Chief

Justice Clark, who delivered the opinion of the court, in discussing the Neagle case, among other things, said:

"No such doctrine is found in Neagle's case (Neagle's case 135 U. S. 1), for it only holds that what the Federal Government enjoins as a duty, the State cannot punish as a crime."

This court by proper order, having directed that the complainant should provide a ticket with a coupon attached thereto representing the difference between the present rate and the proposed rate, it thereby became the duty of the company and its agents to strictly comply with the requirements of such order, and any failure on their part to observe the same would render them liable to an attachment for contempt, and under such circumstances, the duty being enjoined by this court, the performance of the same by the complainant and its agents would not render them liable to punishment under the statute of the State. Any attempt to punish the company or its agents for the observance of the order and decree of this court, would be in utter disregard of the comity which should exist between the State and Federal courts, as well as an absolute nullity.

If the State courts possess the power to indict persons acting under the directions of the Federal court for the performance of a duty enjoined upon them in a suit which may be brought in such court, then the power of the Circuit Courts of the United States would be completely paralyzed and such courts would be rendered unable to proceed to the determination of any question involving the validity of the statute of a State legislature.

While the court is of the opinion that the petitioner is entitled to be discharged, for the reasons hereinbefore stated, nevertheless, there is another phase of this question which the court should consider, in order that there may be a proper determination of the matter in controversy, and in the consideration of which it is encumbent upon the court to pass upon the validity of Section four of the act in question, which reads as follows:

"That any railroad company violating any provision of this act shall be liable to a penalty of five hundred dollars for each violation, payable to the person aggrieved by such violation, and recoverable in an action to be instituted in the name of said person in any court of this State having

competent jurisdiction thereof. And any agent, servant, or employee of any railroad company violating this act shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court."

The foregoing section, among other things provides that the company or its agents shall pay a penalty of five hundred dollars for each failure to comply with the requirements of the act.

It has been held that no State can constitutionally close the doors of the courts to a judicial inquiry into the constitutionality of the rates it fixes.

In the case of Railroad Company *vs.* Minn., 134 U. S., 456, it was held by the Supreme Court of Minnesota that the act in fixing rates was conclusive and there could be no inquiry into such rates by judicial tribunals. Accepting this construction of the Minnesota act by the Supreme Court of that State, the Supreme Court of the United States declared the act unconstitutional, because it denied the railroad company a judicial investigation into the validity of the rates. If this cannot be accomplished directly it cannot be done indirectly.

It is well settled that what cannot be done by express enactment cannot be done by device or indirection. Therefore, any system of penalties which is intended to have the effect and which is so framed as to have the effect of closing the doors of the courts to a judicial inquiry as to rates, is in consequence of that fact unconstitutional and void. Section four of the act in question clearly attempts to do this. It imposes upon the company as a penalty for an unsuccessful attempt to appeal to the court, no matter how *bona fide* this bill is made, such enormous fines and penalties in favor of individuals as to burden the challenger of the act in the courts so as to make it, if the penalties were valid, practically impossible for such an appeal to be made.

In the case of Cotting *vs.* Kansas Stock Yards Co., 183 U. S., 100, Mr. Justice Brewer, who delivered the opinion of the court, in discussing this phase of the question, said:

"It may be said that this is a penal statute, and therefore it is to be construed in favor of the delinquent, and that we have a right to expect that the State courts will construe the penalty as not attaching to the charge for each head of stock, but only to that upon the separate bunches shipped by different individuals. But is the language so clear that there is no

doubt as to the construction? Is ther not enough in it to justify a construction which may be accepted by the trial courts and approved by the Supreme Court of the State, and the construction of a State satute by the Supreme Court of the State is in a case like this conclusive upon us. Must the party upon whom such a liability is threatened take the chances of the construction of a doubtful statute? If the one construction is placed upon it, then obviously, even accepting the largest estimate of value placed by any witness upon the property of the company, a single day's violation of the statute would exhaust such entire value in satisfaction of the penalties incurred. In this feature of the case we are brought face to face with a question which legislation of other states is presenting. Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defence subject to the condition that, upon failure to make good that claim or defence the penalty for such failure either appropriates all of his property, or subjects him to extravagant and unreasonable loss? Let us make some illustrations to suggest the scope of this thought.

"Suppose a law were passed that if any laboring man should bring or defend an action and fail in his claim or defence, either in whole or in part, he should in the one instance forfeit to the defendant half of the amount of his claim, and in the other be punished by a fine equal to half of the recovery against him, and that such law by its terms applied only to laboring men, would there be the slightest hesitation in holding that the laborer was denied the equal protection of the laws? The mere fact that the courts are open to hear his claim or defence is not sufficient, if upon him, and upon him alone, there is visited a substantial penalty for a failure to make good his entire claim or defence. Take another illustration: Suppose a statute that every corporation failing to establish its entire claim, or make good its entire defence, should as a penalty therefor forfeit its corporate franchise, and that no penalty of any kind except the matter of costs was attached to like failures of other litigants, could it be said that the corporations received the equal protection of the law? Take still another illustration: Suppose a law which, while opening the doors of the courts to all litigants, provided that a failure of any plaintiff or defendant to make good his entire claim or entire defence should subject him to a forfeiture of all his property or to some other great penalty;

then, even, if, as all litigants were treated alike, it could be said that there was equal protection of the laws, would not such burden upon all be adjudged a denial of due process of law? Of course, these were extreme illustrations, and they serve only to illustrate the proposition that a statute (although in terms opening the doors of the courts to a particular litigant), which places upon him as a penalty for a failure to make good his claim or defence, a burden so great as to practically intimidate him from asserting that which he believes to be his rights is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws. It may be said that these illustrations are not pertinent because they are of civil actions, whereas this statute makes certain conduct by the stock yards company a criminal offence, and simply imposes punishment for such offence: that it is within the competency of the legislature to prescribe penalties for all offences, either those existing at common law or those created by statute; and further, that although that the penalties herein imposed may be large, yet obedience to a statute like this can only be secured by large penalties; for otherwise the company, being wealthy and powerful, might defiantly disregard its mandates, trusting to the manifold chances of litigation to prevent any serious loss from disobedience. A penalty of a dollar on a large corporation, whose assets amount to millions, would not be very deterrent from disobedience. It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations; and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts, that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is deprived of the equal protection of the laws."

The evidence shows that one case under this provision of the act has already been tried in the Superior Court of Wake county against the complainant as a corporation and one of its agents at that place. In that case the court imposed a fine of thirty thousand dollars against the company, and

notified the agent that if he would stop selling tickets at a price that was authorized by the decree of this court the judge would impose a nominal punishment, but if he did not, the court would not say what it would do until it had received an answer.

In making this reference I do not wish to be understood as criticising the State court, for there is no one in the State for whom I entertain a higher regard than Judge Long.

It is also shown by the uncontradicted evidence in this case that at least five thousand tickets are sold daily by complainant at its various offices in the State, in its intra-state business, thereby making it possible for it to be sued five thousand times in one day for penalties amounting to five hundred dollars in each instance on account of its failure to comply with the statute fixing passenger rates.

Thus it will be seen that by an enforcement of the statute judgments can be obtained against the complainant for the sum of two million and five hundred thousand dollars for each day. The aggregate penalties which could be obtained for one day would amount to a sum more than eight times as much as the sum involved in the original suit for one year between complainant and defendants.

This system of legislation is also condemned by Judge Lacombe, in the case of Consolidated Gas Co. *vs.* Mayor, 146 Fed. Rep. 150, and the conclusion is irresistible, from what this distinguished jurist has to say that such a system of penalties is unconstitutional and void. This not only applies to penalties in favor of individuals against the company, but also as to penalties against agents of the company which would render it utterly impossible for the company to carry on its business while having an orderly inquiry made by the courts as to its constitutional rights.

I am therefore of the opinion that the section of the act attempting to impose penalties and fines is unconstitutional and void upon the face of the act.

An order dismissing the petitioners from the custody of the officers of the State court will be entered and a copy of the same will be certified to the Police Justice of the city of Asheville and the Sheriff of Buncombe county, in whose custody petitioner is.

EXHIBIT B.

United States of America, Eastern District of North Carolina.

IN THE CIRCUIT COURT.

IN EQUITY.

SOUTHERN RAILWAY COMPANY, *Complainant*,

versus

FRANKLIN MCNEILL, SAMUEL L. ROGERS, EUGENE C. BEDDINGFIELD, ROBERT D. GILMER, and HAYDEN CLEMENT, *Defendants*.

ALFRED P. THOM, WALKER D. HINES, W. B. RODMAN, and ALEX. P. HUMPHREY, Solicitors for Complainant.

JAS. E. SHEPHERD, FRED A. WOODWARD, VICTOR S. BRYANT, and WALTER E. DANIELS, Counsel for Defendants.

The bill alleges that the complainant is a corporation originally created under the laws of Virginia. Under its charter, and under authority from other states, it is authorized to own, lease, control and operate railroads not only in Virginia, but in other states of the union; that under this power, it has acquired and is operating a continuous line of railroad, over six thousand miles in length, extending through the states of Virginia, North Carolina,

South Carolina, Georgia, Alabama, Mississippi and Tennessee, and by trackage rights this system is connected with another system owned by complainant and lying in the states of Kentucky, Indiana and Illinois. The complainant as a common carrier of freight and passengers, is and has been since its organization engaged in both intra and interstate commerce over its line of road.

The defendants admit the authority of the complainant to own and operate roads in North Carolina, but deny that the state of North Carolina has surrendered or given up its right to supervise, regulate and control the complainant's line of railroad in North Carolina, and specially claims that the state has the power to fix and prescribe rates, both freight and passenger, and has the power to make rules and regulations governing the amount of freight, the furnishing of cars, and the power to prescribe penalties for any violation thereof, controlled only by the Fourteenth Amendment of the Constitution of the United States.

The General Assembly of North Carolina at its session of 1907, passed two laws regulationg rates, the subject matter of this controversy. (1) The Passenger Rate Act which provides, section one, for maximum passenger rate of two and one quarter cents per mile, except as to children twelve years of age or under, and as to these half price; and provides that the Corporation Commission may exempt all independently owned and operated lines of less than sixty miles in length, and certain newly constructed lines. Section 2. That wherever a road is owned, controlled or operated, by lease or any other agreement, by any other road, the rate for the road so owned shall be determined by the rate prescribed by the act for the road owning or operating the other. The Corporation Commission is required to publish the rates prescribed by the act prior to June 1st, 1907. Section 3 requires interchangeable books to be kept on sale at such stations as the Corporation Commission may designate, and requires railroads to honor mileage books issued by other roads. Section 4 provides a penalty of $500 against any railroad company violating any of the provisions of the act, and makes a servant of the company guilty of a misdemeanor.

The Freight Rate Act provides, section one, that the Corporation Commission shall not, in fixing the maximum freight rates, permit common carriers to receive a greater

toll for shipment over connecting lines than the sum of the present locals, less twenty-five per centum, and provides that when the freight rate on any road is not so high as the present tariff, the Commission may permit the same to be increased to the present standard; the Commission is authorized to reduce any tariff of rates when, in their opinion, such reduction shall be just, but has no power to increase any tariff of rates either by classification or otherwise. Section two provides penalties for rebating or discrimination. Section three: if any shipper shall make a written application for a car or cars for use in shipment of freight, if the railroad company shall fail to furnish the said cars within four days the company shall be penalized in the sum of five dollars per day, until the said cars are furnished. Section four provides certain penalties for failure to transport freight within a reasonable time. Section five directs the Corporation Commission to prepare and publish the tariff of rates, charges and tolls authorized to be charged and collected under this act.

The complainant alleges that at the same session of the General Assembly there were passed certain other laws regulating the business of complainant, and that the effect of said laws would be to greatly increase the cost of conducting its business and make the charge more burdensome than heretofore. Said acts are referred to by their titles as follows:

1. "An Act to provide for the assessment of Real Estate of Railroad Companies in stock law territory for local benefit," ratified March 8, 1907.

2. "An Act to prescribe the hours of service of employees for Railroad Companies engaged in the operation of trains," ratified March 8, 1907.

3. "An Act to authorize the Corporation Commission to require Railroads to erect and maintain Union Depots in towns of 2,000 inhabitants," ratified March 11, 1907.

4. "An Act to extend and enlarge the power of the Corporation Commission," ratified March 11, 1907.

Complainant contends that it has property in North Carolina devoted to the business of carriage, freight and passenger, of the assessed value for taxation of $26,134,865.00, and that of this amount $7,213,222.74 is devoted to the intrastate commerce of North Carolina. That the property of complainant like all other property in North Carolina, is worth

more commercially than its assessed tax valuation. That the bonded indebtedness of the complainant, applicable to its North Carolina property, is $24,623,078.29, the annual interest charge on said indebtedness is $714,103.08. In addition to its annual interest charge complainant is compelled to pay for rentals and trackage in North Carolina $481,189.99. That the part of said interest, rental and trackage charges devoted to intra-state business in North Carolina is $329,900.89 per annum, and this does not consider any question of stock or dividends on stock. The defendants in their answer admit the passage of the laws referred to and admit the tax valuation of the property, deny any knowledge of the validity of the bonded indebtedness or the amount thereof, but allege that it is in excess of the value of the property, and allege that the complainant's stock is watered, and that the amount of bonded indebtedness and the amount of stock are merely items and elements in ascertaining the value of the property, and in ascertaining what is a just, fair and reasonable compensation in fixing the rates.

The complainant contends that the effect of the act in respect to freight rates, and of the act in respect to passenger rates, whether taken separately or together, would, if enforced, as will appear from the figures stated in the bill, be to deprive the complainant of its property without due process of law.

The complainant contends that under the laws of North Carolina the Corporation Commission is charged with the duty of making just and reasonable rates for the transportation both of freight and passengers, that it is charged with the duty of making full investigation of every element which enters into and constitutes one of the things required to be considered in fixing such rate; that prior to March 2, 1907, the Corporation Commission, after full investigation as required by law, made and established a passenger rate for complainant's lines of three and one-quarter cents per mile for first class fare and two and three-quarter cents per mile for second class fare, and established the present standard tariff of freight rates and provided that where there was a haul over two connecting lines, the rate charged by such common carriers should be the sum of the locals, less fifteen per cent. Complainant contends that these rates are in the main reasonable and just, and that the same were fixed by the body charged under the law, with that duty, and

wherever they are unreasonable and unjust, they are too low, and should be increased.

The complainant contends that its existing rate fabric is upon the whole properly adjusted, not only in its relation to intra-state traffic, but in its relation between its inter-state rates and its intra-state rates in North Carolina and in other states. It admits that there may be cited a few instances needing correction, but alleges that they are negligible and not to be considered in this matter; that the present rates do not yield more than a just and resaonable return upon the value of the property used in the service, and that the rate charged is not higher than a just and reasonable compensation for the service rendered, whether considered on the basis of a fair return on the money invested or in respect to the service rendered.

The complainant contends that the effect of the act in respect to Passenger Rates and the act in respect to Freight Rates, whether taken separately or together, if enforced, would be to so reduce the return to complainant for the service rendered, that it would deprive complainant of its property without just compensation, without due process of law, and deny to it the equal protection of the laws, and would interfere with interstate commerce.

Complainant contends that if the rates mentioned are put into effect and enforced, they would reduce the revenue of complainant upon its intra-state business about $300,000.00 per annum, that the effect of this reduction would be to leave to the complainant only about $29,000.00 net earnings from its intra-state business, assuming that the costs of operation did not increase, and that the number of passengers and tonnage remained relatively the same. Complainant contends that this would be true not allowing anything for the interest on the bonded indebtedness or for the payment of trackage or rentals; that it could not pay the interest on its bonds, much less pay any dividends, and that this return would be only .39 of 1 per cent. on the assessed valuation of complainant's property devoted to intra-state business. The complainant contends further that, owing to the increased and increasing cost of operating expenses, occasioned in part by the legislation of the State of North Carolina, and in part by the general increasing price of commodities, this small balance would be wiped out and a deficit would be left, even though complainant should

continue to use, as it has done in the past, the utmost economy in the management of its property.

The complainant contends that section three of the act in respect to freight rates, which requires complainant, at any time upon the written application of any shipper to within four days furnish such shipper with a car or cars as demanded, and the complainant fails to furnish such cars, it shall be liable for a penalty of five dollars per day, until said cars are furnished, is unconstitutional and void, for that the requirements are peremptory and no exception is made on account of the liability of the carrier to comply with such request, although the cars may be in other states, may be actually engaged in interstate commerce, or may be prevented by an accident, congestion of traffic, or other causes beyond the control of the complainant, and is such a regulation as cannot, under the law, be made, and is a regulation depriving the complainant of the right to use its cars in fair and just proportion according to the demands made upon it, both for interstate and intrastate business. That said section is unconstitutional and void for that it undertakes to classify the said roads in the State without any just and reasonable basis for such classification, and denies the equal protection of the laws in violation of the Fourteenth Amendment.

The complainant contends that the said acts in respect to both freight and passenger rates by a system of enormous fines and penalties, therein sought to be imposed, close the doors of the courts to complainant, and make the terms upon which complainant may enter the courts so unequal as compared with other suitors, that it denies to complainant the equal protection of the laws and due process of law in violation of the Fourteenth Amendment.

Complainant contends that section three of the act in respect to passenger rates requiring the complainant to keep on sale mileage books, which shall be good in the hands of the person named therein on all the roads in the State on which the fare is the same or less than the fare on the road of the company selling such books, and requires the complainant to redeem such mileage books, or mileage sold by another company, in payment of transportation, is unconstitutional and void, for that the regulations are so unreasonable and unjust as to deprive the complainant of the right to use its property in the conduct of its business, and

such laws are not within the power of the General Assembly to enact, but imposes unjust and unreasonable burdens on complainant, and deprives it of its property without due process of law.

Complainant contends that the classification of railroads as attempted both in the freight rate act and passenger rate act is unjust, unreasonable and unlawful as having no just and proper basis on which to make such classification, and is in violation of the Fourteenth Amendment of the Constitution of the United States.

Complainant contends that under the said acts the Corporation Commission was, as to the act in respect to freight rates before the said act went into effect, required to prepare and publish the tariff of rates authorized by the said act, and as to the act in respect to passenger rates, the Corporation Commission was required by said act and the laws of North Carolina to prepare a just and reasonable rate for the said railroads in North Carolina as prescribed in said act, and was required on or before June 1st, to publish said rate so fixed, and the said Commission was further required to designate the places at which mileage books should be kept on sale, and that the commission was, under the laws of North Carolina, specially charged with the duty of enforcing the said two acts, and of the enforcement of the laws relating to common carriers, and was charged with the duty of regulating said common carriers, and had full control and supervision over such common carriers, and that the Attorney General and the Assistant Attorney General were specially charged with the duty of enforcing the laws of North Carolina, including the said two acts as against the complainant.

The complainant contends that it has the right, under the constitution, whenever the circumstances may justify it, to increase its rates, either passenger or freight, when by the increased price of commodities of all kinds including labor, the cost of operation becomes such as to make the then existing rate so low as to be confiscatory, and that it has this right, as an incident of property; and that the act of the legislature in so far as it tends to deprive the complainant of its rights, is in conflict with the Fourteenth Amendment of the Constitution, and is, therefore, void.

The complainant contends that it had a right to come into

a court of Chancery and make defendants, those representatives of the state who were specially charged, under law, with the performance of the duty of enforcing these acts, and have the validity and reasonableness and justness of the rates inquired into, and to have inquired into by a court of Chancery the effect of such law upon complainant's property, and to have such property protected pending the litigation.

The defendants admit that prior to March 2, 1907, the corporation Commission, in the exercise of the power conferred upon it by law, had established a passenger tariff of three and a quarter cents per mile for first class fare and two and three-quarter cents per mile for second class fare, and had established the present standard tariff of freight rates for intra-state traffic, and had provided for a reduction of fifteen per centum from the sum of the locals on a joint haul. The defendants contend, however, that a reduction of the rates heretofore established, as provided for in these acts, would not be unreasonable and unjust and say:

(1.) That while the maximum rates fixed by the Commission prior to the acts of March 2, 1907, were for passenger traffic three and one-quarter cents per mile for first class fare and two and three-quarter cents per mile for second class fare, yet that complainant habitually sold mileage books at two and a half cents per mile. (2.) That not only did complainant sell mileage books, good over its lines, at two and a half cents per mile, but that during the summer season, that is between June 1st and October 31st, of each year, it sold season tickets from points in Eastern and Central Carolina to points in Western Carolina at the rate of two cents per mile. (3.) That complainant sold tickets to ministers of the gospel at about two cents per mile. (4.) That the average of all tickets sold in North Carolina for intra-state travel was during the year ending June 30, 1904, 2.39 cents per mile, and during the year 1905, 2.386 cents per mile, and during the year 1906, 2.508 cents per mile, and that the average over complainant's entire system for the year 1906, was only 2.41 cents per mile. (5.) That complainant in violation of the laws of the state carried many influential people free, and that this was done to get their business or to influence them. (6.) That the complainant pays exorbitant and extravagant salaries, and paid out last year large sums in settlement with persons injured on its system, or while in its employment, and large sums

for lost or damaged goods, and large sums for clearing of wrecks, and large sums for advertising its business. The defendants allege that if complainant would stop selling tickets and transporting persons at less than two and a quarter cents, and charge all persons two and a quarter cents that the act in respect to passenger rates would not reduce the revenue of complainant as much as complainant claims.

Defendants contend that the figures given in the bill in reference to complainant's earnings are correct. They allege that the complainant was required by law to make report to the Corporation Commission, both as to its earnings and operating expenses, that such reports were made, and, based on such reports and after hearing, the General Assembly of North Carolina passed the two acts in question, and that, if the figures given in the said reports be taken as true, the complainant would be able to lose all that it claims that it would lose under the said acts, and would have a sufficient net revenue left to pay five and one-half per cent. per annum upon the assessed value of that part of its property devoted to intra-state business.

Defendants contend that the complainant not only earns a large revenue on its intra-state business, but considering both its intra-state and inter-state business and its entire operating expenses on that part of its line lying in North Carolina, its net earnings are about ten per cent. of the assessed value of its property.

The defendants contend that the General Assembly abolished two classes of fares and that the result of such act would be a great saving in the operating expenses of complainant, and that the growth of the country and the greatly increased travel which would be stimulated by the reduction of rates, will increase complainant's revenue without sensibly increasing its expenses.

The defendants contend that even in its reports made to the Corporation Commission the complainant has incorrectly stated its operating expenses in making the partition between the cost of intra-state and inter-state business, and that if the true rule were adopted, that is the cost of doing intra-state and inter-state business distributed proportionately, the rates for complainant's lines would be greatly reduced below that named in the acts.

Defendants contend that the acts in question are self-executing; that none of the defendants have any special duty imposed upon them, or either of them, in reference to said acts, or either of them, and that this is a suit against the state of North Carolina, and forbidden by the Eleventh Amendment of the Constitution of the United States; that the laws are constitutional, and positive in their provisions, and are self-executing and that this suit cannot be maintained.

In considering the motion to continue the restraining order heretofore granted until the final hearing of the cause, the court is called upon to determine, first, as to whether it has jurisdiction of the parties as well as the subject matter of the controversy involved in this proceeding.

It is insisted by counsel for defendants that this is a suit against the state within the meaning of the Eleventh Amendment of the Constitution of the United States, and that therefore, this court is without jurisdiction. Counsel cite in support of this contention the case of Fitts *v.* McGhee, 172 U. S., 516.

Complainant contends that this is not a suit against the State of North Carolina. As to the Corporation Commissioners, complainant contends in the first place, that they are charged with the duty of making the rates, both passenger and freight, for the railroad companies in North Carolina, and even if this is not true, that they have essential duties to perform in connection with the putting into effect of the freight and passenger acts of 1907.

Complainant refers to the following statutes as applicable to the connection of the Commissioners with the rates in question:

Revisal 1905, Chapter 61, Railroads, Sub-head IV. CORPORATE POWERS.

Section 2567. General Powers. Every railroad corporation shall have power:

"7. RIGHT TO CARRY PERSONS AND PROPERTY.

"To take and convey persons and property on its railroad by the power or force of steam, electricity or animals, or by any mechanical power, and to receive compensation therefor."

"9. REGULATION OF TIME AND MANNER OF TRANSPORTATION.

To regulate the time and manner in which passengers and property shall be transported and the compensation to

be paid therefor; and such compensation for any passenger and his ordinary baggage shall not exceed five cents per mile."

Section 2618. First and Second Class Accommodations. "All railroad companies shall furnish first and second class passenger accommodations."

Chapter 20. CORPORATION COMMISSION, Sub-head III. POWERS.

Section 1066. "**General Powers.** The corporation commission shall have such general control and supervision of all railroad, street railway, steamboat, canal, express and sleeping car companies or corporations and of all companies or corporations engaged in the carrying of freight or passengers, of all telegraph and telephone companies, of all public and private banks and all loan and trust companies or corporations, and of all building and loan associations or companies, necessary to carry into effect the provisions of this chapter, and the laws regulating such companies."

Sub-head VII. JURISDICTION.

Section 1099. "**Freight and Passenger Rates.** The Commission shall make reasonable and just rates—

1. Of freight, passenger and express tariffs for railroads, street railways, steam boats, canal and express companies or corporations, and all other transportation companies or corporations engaged in the carriage of freight, express or passengers.

2. For the through transportation of freight, express or passengers.

3. Of charges for the transportation of packages by any express company or corporation.

4. Of charges for the use of railroad cars carrying freight or passengers.

5. And rules and regulations as to contracts entered into by any railroad company or corporation to carry over its line or any part thereof the car or cars of any other company or corporation.

6. And shall make, require or approve what is known as 'milling-in-transit' rates on grain; or lumber to be dressed and shipped over the line of the railroad company on which such freight originated.

7. And, conjointly with such railroad companies, shall have authority to make special rates for the purpose of developing all manufacturing, mining, milling and internal improvements in the state.

Nothing in this chapter shall prohibit railroad or steam boat companies from making special passenger rates with excursion or other parties, also rates on such freights as are necessary for the comfort of such parties, subject to the approval of the commission."

Sub-head VIII. RATES.

Section 1104. "**How Fixed.** In fixing any maximum rate or charge, or tariff of rates or charges for any common carrier, person or corporation subject to the provisions of this chapter the commission shall take into consideration if proved, or may require proof of, the value of the property of such carrier, person or corporation used for the public in the consideration of such rate or charge or the fair value of the service rendered in determining the value of the property so being used for the convenience of the public. It shall furthermore consider the original cost of the construction thereof and the amount expended in permanent improvements thereon and the present compared with the original cost of construction of all of its property within the state; the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier, person or corporation and all other facts that will enable them to determine what are reasonable and just rates, charges and tariffs."

Section 1106. "**Revision of Rates.** The Commission shall from time to time, and as often as circumstances may require, change and revise or cause to be changed and revised any schedules of rates fixed by the Commission, or allowed to be charged by any carrier of freight, passengers, or express, or by any telegraph or telephone company."

Section 1109. "**Published.** All carriers shall, whenever required by the commission, file with it a schedule of their rates of charges for freight and passengers, and the commission is authorized and required to publish the rates, or a summary thereof, in some convenient form for the information of the public, and quarterly thereafter the changes made in such schedules if they deem it advisable."

Section 1112. "**Schedule of Rates, Evidence.** The schedule containing rates fixed by the commission shall, in suits brought against any company wherein is involved the charges of any company for the transportation of any passenger or freight or cars or unjust discrimination in relation thereto, be taken in all courts as *prima facie* evidence

that the rates therein fixed are just and reasonable rates of charges for the transporation of passengers and freights and cars upon the railroads. All such schedules shall be received and held in all suits as *prima facie* evidence, the schedules of the commission without further proof than the production of the schedules desired to be used as evidence, with a certificate of the clerk of the commission that the same is a true copy of the schedule prepared or approved by it for the railroad company or corporation therein named."

Sub-head IV. APPEALS.

Section 1078. Rates Vacated Pending Appeal, How.

The rates of freight and fare fixed by the commission shall be and remain the established rates and shall be so observed and regarded by corporations appealing until the same shall be changed, reversed or modified by the judgment of the superior court, unless the railroad company shall within fifteen days file with said commission a justified undertaking, in a sum to be fixed by the commission, conditioned to pay the state of North Carolina the difference between the aggregate freights charged or received and those fixed by said commission, and to make a report of freights charged or received, every three months during the pendency of such appeal; and whenever such difference in freights equals or exceeds the penalty of such undertaking the commission may require another to be executed and filed with them. From the time the undertaking first mentioned is filed the judgment appealed from shall be vacated; but a failure for ten days to file any additional undertaking required by the commission shall *eo instanti* revive such judgment. Out of the funds paid into the state treasury under this section there shall be refunded to shippers the overpaid freight ascertained by the final determination of the appeal on the recommendation of the commission, if application therefor is made within one year from such final determination."

Sub-head V. INJUNCTION.

Section 1082. "When Granted;" Bond.

"No judge shall grant an injunction, restraining order or other process staying or affecting, during the pending of any appeal, the enforcement of any determination of the corporation commission fixing rates or fares, without requiring as a condition precedent the executing and filing with the corporation commission of a justified undertaking in the

sum of not less than twenty-five thousand dollars for any company whose road is of less length than fifty miles, and fifty thousand dollars for any company whose road is over fifty miles in length, conditioned that the company will make and file with the corporation commission a sworn statement every three months during the pending of the appeal of the items of freight, with names of shippers, carried over such company's road within the preceding ninety days, showing the freight charged and those fixed by the corporation commission; and in the event the determination of the corporation commission appealed from is affirmed in part or in whole such company shall within thirty days pay into the treasury of North Carolina the aggregate difference between the freights collected and those fixed by the final determination of the matter appealed."

Sub-head VI. PENALTIES.

Section 1086. "For Violating Rules. If any railroad company doing business in this state by its agents or employees shall be guilty of a violation of the rules and regulations provided and prescribed by the commission, and if after due notice of such violation given to the principal officers thereof, if residing in the state, or, if not, to the manager or superintendent or secretary or treasurer if residing in the state, or if not then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation as may be directed by the commission shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of five hundred dollars."

Section 1087. "Refusing to Obey Orders of Commission. Any railroad or other corporation which violates any of the provisions of this chapter or refuses to conform to or obey any rule, order or regulation of the corporation commission shall, in addition to the other penalties prescribed in this chapter, forfeit and pay the sum of five hundred dollars for each offense, to be recovered in an action to be instituted in the superior court of Wake county, in the name of the state of North Carolina on the relation of the corporation commission; and each day such company continues to violate any provision of this chapter or continues to refuse to obey or perform any rule, order or regulation prescribed by the corporation commission shall be a separate offense."

Section 1092. "Action For, When and How Brought. An action for the recovery of any penalty under this chapter shall be instituted in the county in which the penalty has been incurred, and shall be instituted in the name of the state of North Carolina on the relation of the corporation commission against the company incurring such penalty; or whenever such action is upon the complaint of any injured person or corporation, it shall be instituted in the name of the state of North Carolina on the relation of the corporation commission upon the complaint of such injured person or corporation against the company incurring such penalty. Such action shall be instituted and prosecuted by the Attorney General or the Solicitor of the judicial district in which such penalty has been incurred, and the judge before whom the same is tried shall determine the amount of compensation to be allowed the Attorney General or such solicitor prosecuting said action for his services, and such compensation so determined shall be taxed as part of the cost. The procedure in such actions, the right of appeal and the rules regulating appeals shall be the same as are now provided by law in other civil actions."

The freight rate act contains no clause repealing prior laws. The passenger rate act contains no repealing clause except section 6, which expressly repeals section 2618 of the Revisal of 1905 (which provides for first and second class passenger accommodations). This section also repeals "all laws and clauses of laws in conflict with this act."

In other words it is insisted by complainant that, at the date of the passage of the act in question, the laws of North Carolina contained ample provision for the control and supervision of railroads by the corporation commission, and that such commission was fully empowered to inquire into and determine what rates should be charged by the various railroad companies operating their lines in the state. That the act of 1907, in so far as the freight rate act is concerned, contains no provision repealing laws that were in existence at that time; that the passenger rate act only contains a clause repealing section 6, which expressly repeals section 2618 of the Revisal of 1905. That under these circumstances all laws then in existence, not inconsistent with the act of 1907, are still in force as a part of the laws relating to the management and control of railroads in that state.

The rule by which the court is governed in ascertaining

what part of a prior statute is repealed by a later one, is laid down by the Supreme Court of North Carolina in the following language:

"A statute will not be construed as repealing a prior one on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnancy between them or unless the new law is evidently intended to supersede the prior one upon the subject, and to comprise in itself the sole and complete system of legislation on that subject."

Black on Interpretation of Laws, 112;
Endlich on Interpretation of Statutes, 210;
Sutherland on Statutory Construction, Sec. 138.

"The two acts now being construed being affirmative, and the subject being such that both may stand together, they both should have concurrent efficacy (1 Blk. 90) unless they be repugnant or inconsistent, or it should appear that the legislature intended to cover the whole subject embraced in both and to prescribe the only rule in respect of that subject in the later act."

College *vs.* Lacy, 130 N. C. 364.

It is well settled that a repeal by implication is not favored.

Jones *v.* Ins. Co. 66 N. C. 499;
Greensboro *v.* McAdoo, 112 N. C. 360;
State *v.* Monger, 111 N. C. 675;
State *v.* Snow, 117 N. C. 774.

Section one of the passenger rate act of 1907, is as follows:

"No railroad company doing business as a common carrier of passengers in the state of North Carolina, except as hereinafter provided, shall charge, demand or receive for transporting any passenger and his or her baggage, not exceeding in weight two hundred pounds, from any station on its railroad in North Carolina to any other station on its railroad in North Carolina, a rate in excess of two and one-quarter cents per mile, and for transporting children twelve years of age or under one-half the rate described, etc."

Then follows a proviso, giving to the corporation commission the power to exempt certain railroads from the operation of the statute and to permit them to charge a higher rate.

The foregoing provisions in section one do not undertake to make the rate of passenger charges, but simply to fix a

maximum limit, so that the effect of section one is to substitute "two and one-quarter cents per mile, and for transporting children twelve years of age and under, one-half of the rate above described" in place of the word "five" in line four of sub-section nine of section 2567 of the Revisal, and also to provide that at least two hundred pounds of baggage shall be carried for each passenger without extra charge.

Under sub-section 9 of section 2567, railroad companies had the right to make the compensation for their services within the limit of five cents per mile, which was fixed as the maximum by the section in question. However, the court is of opinion that this sub-section repealed by implication sub-section one of section 1099 of the Revisal (passed in 1899), which imposed upon the commission the duty of making rates for freight and passenger service on railroads, thus taking the power to make rates from the railroads. Sub-section 9 of section 2567 has now been expressly repealed by section 7 of the act of March 11, 1907 (Chapter 469, Laws of 1907), which act is entitled "An act to extend and enlarge the powers of the North Carolina Railroad Commission." Therefore, it necessarily follows that the power of making railroad rates still rests upon the commission and that the acts sought to be restrained are not self-executing. The act of March 11 shows that the legislature clearly intended that all of the acts concerning railroad rates should be considered as being part of the law relating to the subject.

It is proper to consider a repealed statute in arriving at a proper construction of the several acts. Wilson *v.* Jordan, 124 N. C. 638.

The commission has of course no right to establish and publish rates higher than those allowed in the act of 1907; yet, within that limit the power and duty devolve upon it and upon it alone, to make rates for railroad companies.

The duty of the commission to make rates for railroad companies subject to the limitation contained in the act of 1907, is imposed by section 1106 of the Revisal which provides:

"The commission shall from time to time, and as often as circumstances shall require, change and revise or cause to be changed or revised, any schedule of rates fixed by the commission or allowed to be charged by any carrier of freight, passenger, express or by any telegraph or telephone company."

As an illustration, suppose that after an investigation by the corporation commission, under the authority conferred upon it by the statute of the state, and in the performance of the duty therein imposed, it should appear that a flat rate of two cents a mile or less would be a reasonable and just rate, could it be contended, that under the provision of the foregoing section the commission would not have the right to "change and revise or cause to be changed or revised" the rates as now established by law?

In establishing rates the commission is governed and controlled by the provisions of section 1104 quoted, and as stated, cannot make rates higher than those provided for in the statutes of 1907, yet the duty devolves upon it to say what shall be just and reasonable rates, within the maximum prescribed by the legislature.

If this be a proper construction of the act, it makes one harmonious whole and thus gives force and effect to every statute relating to the subject in accordance with the intention of the legislature, which, the court is of opinion, was that the commission might make rates lower than two and a quarter cents except as to certain roads.

In this view of the law, the corporation commissioners, are charged with a duty in connection with the enforcement of the act of 1907, and are, therefore, proper parties to this suit.

Even if it were conceded that, railroad rates can be established other than by the commission, yet the complainant contends that the commission is specially charged with important duties in connection with the enforcement of the acts in question by the laws of North Carolina. That among other things it is the duty of the corporation commission to take necessary steps to secure the enforcement of section four, which provides for the prosecution of penalty suits against the complainant for a failure to comply with the provisions of section one, and likewise, to prosecute its agents and employees for a failure on their part to comply with that section. As to the freight rate act it is not seriously contended by the defendants that that act can go into effect in the absence of action on the part of the commission, since section one of that act provides, "that the corporation commission, created by the laws of North Carolina shall not, in fixing the maximum rates and charges, or tariff of rates or charges for any common carrier transporting freight in

North Carolina permit or allow any such common carrier to charge, collect or receive a greater toll, charge or rate for the transportation of any article of freight or commodity embraced in the present classification and prescribed, etc." And section five of the act provides that, "The Corporation Commission is hereby directed to prepare and publish a tariff of rates, charges and tolls, to be charged and collected by railroad companies in this State, as authorized by this act, on or before the first day of July, one thousand nine hundred and seven."

The foregoing provisions are important and should be considered as bearing directly upon the question as to whether the court, independently of the provisions hereinbefore referred to, does not have jurisdiction.

The defendants' counsel rely upon the case of Fitts *v.* McGhee, 172 U. S., 516, as before stated, to sustain their contention that this is a suit against the State.

In that case, the Memphis & Charleston Railroad owned the Florence Bridge, under an act of the legislature of the State of Alabama passed in 1895. It was provided what should be charged as maximum tolls on that bridge and it was also provided that any one charging more should be subject to a penalty of twenty dollars to be sued for in a court of a justice of the peace. In that case no state officer was charged with the performance of any duty in connection with the enforcement of the act. There was nothing in the act which required the Attorney General or the Governor to perform any duty in connection with the execution or enforcement of the same. When that act was passed the cases of Samuel Thomas *vs.* Memphis & Charleston Railroad Company and Central Trust Company of New York *vs.* Memphis & Charleston Railroad Company were pending in the court below; and on the 14th day of February, 1895, Charles M. McGhee and Henry Fink, receivers of the Memphis & Charleston Railroad in those causes, having first obtained leave to do so, filed a bill in the name of themselves and the railroad company against "the State of Alabama, William C. Oates, as Governor of the State of Alabama, and William C. Fitts, as Attorney General of the State of Alabama." In the meantime a discontinuance was taken as to the Governor and the State of Alabama, and the cause was proceeded with against the Attorney General and the Solicitor of the 11th Judicial Circuit of Alabama.

In a very able and exhaustive opinion delivered by Mr. Justice Harlan in that case it was held by the Supreme Court that neither the Attorney General of Alabama, nor the Solicitor of the 11th Judicial Circuit of that State was charged by law with any special duty in connection with the enforcement of the act of February 9, 1895.

The act of the legislature in that instance was self executing and to all intents and purposes was as much an independent and general law of the State as any of the statutes enacted by the legislature. Under such circumstances, the only possible means by which the constitutionality of such an act could have been tested would have been by taking an appeal or writ of error from a judgment rendered thereon to the Supreme Court of the State, and, if it appeared that a federal question was necessarily involved, or passed upon by the court, thence to the Supreme Court of the United States.

In that case, Mr. Justice Harlan said:

"It is to be observed that neither the Attorney General of Alabama nor the Solicitor of the eleventh judicial circuit of the state, appear to have been charged by law with any special duty in connection with the act of February 9th, 1895. In support of the contention that the present suit is not one against the State, reference was made by counsel to several cases, among which were Poindexter *v.* Greengow, 114 U. S., 270; Allen *v.* Baltimore & Ohio R. Co., 114 U. S., 311; Pennoyer *v.* McConnaughy, 140 U. S., 1; *In re* Tyler, 149 U. S., 164; Reagan *v.* Farmers' Loan & Trust Co., 154 U. S., 362, 388; Scott *v.* Donald, 165 U. S., 58; and Smyth *v.* Ames, 169 U. S., 466. Upon examination it will be found that the defendants in each of those cases were officers of the state, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or about to commit some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In

the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional."

The learned Justice clearly states the distinction between the case of Fitts *v.* McGhee and the one now under consideration. There is a manifest distinction between that case and the case at bar. In this case it appears that the members of the Corporation Commission of North Carolina are "specially charged" with the performance of duties in connection with the enforcement of the act of the legislature of North Carolina. Likewise, the Attorney General is charged with the performance of a duty in connection therewith.

Section 1066 of the Revisal of North Carolina of 1905, is as follows:

"The corporation commission shall have such general control and supervision of all railroads, street railway, steamboat, canal, express and sleeping car companies or corporations and of all other companies and corporations engaged in the carrying of freight and passengers, of all telegraph and telephone companies, of all public and private banks and all loan and trust companies or corporations, and of all building and loan associations or companies, necessary to carry into effect the provisions of this chapter, and the laws regulating such companies." (1899, c. 164, s. 1; 1901, c. 679).

Section 1113 of the same chapter is as follows:

"The commission, whenever in its judgment any corporation has violated any law, shall give notice thereof in writing to such corporation, and, if the violation or neglect is continued after such notice, shall forthwith present the facts to the Attorney General, who shall take such proceedings thereon as he may deem expedient." (1899, c. 164, s. 8).

Section 5380, c. 115 end of chapter VII of the same Revisal is as follows:

"It shall be the duty of the Attorney General—

1. To defend all actions in the Supreme Court in which the state shall be interested, or is a party; and also when requested by the governor or either branch of the general assembly to appear for the state in any other court or tribunal in any cause or matter, civil or criminal, in which the state may be a party or interested.

2. At the request of the governor, secretary of state, treas-

urer, auditor, corporation commissioners, insurance commissioner, or superintendent of public instruction, he shall prosecute and defend all suits relating to matters connected with their departments.

3. To represent all state institutions, including the state's prison, whenever requested so to do by the official head of any such institution.

4. To consult with and advise the solicitors when requested by them in all matters pertaining to the duties of their office.

5. To give, when required, his opinion upon all questions of law submitted to him by the general assembly, or by either branch thereof, or by the governor, auditor, treasurer, or any other state officer."

Section 2 of the act of 1907, relating to passenger rates, is as follows:

"In the case that any railroad company operating as a common carrier of passengers in the state of North Carolina is owned, controlled or operated by any other railroad company doing business in this state, the rate for carrying passengers thereon as prescribed in this act shall be determined for said railroad by the rate prescribed by this act for the railroad company which owns, controls or operates the same; and the North Carolina Corporation Commission shall publish the rates fixed by this act for the several railroad companies operating in this state, on or before the first day of June 1907."

It is also, among other things, provided in section 1, as follows:

"Provided that the corporation commission of North Carolina is hereby authorized and empowered to permit all independently owned and operated railroads in North Carolina whose mileage in said state is sixty miles or under to charge a rate for transporting passengers not in excess of the present rate fixed and prescribed for said road and also permit all railroads constructed within twelve months preceding the first day of January 1907, or at that time in course of construction for a term of two years from and after July first 1907, and also all such railroads as may be constructed within two years from January first, 1907, to charge such rate in excess of the rate above prescribed as the said commission may determine to be reasonable."

Section 2 makes it the duty of the commission to de-

termine whether a road is controlled or operated by another railroad, and when that is done, the rate must be determined and published.

It is insisted by counsel for defendants that there is nothing in the act of the legislature of 1907, which specially charges the corporation commission, or the Attorney General with the enforcement of such act. This contention in so far as it relates to passenger rates with the exception of section two of the act, is undoubtedly true. Notwithstanding that such is the case, it must be borne in mind that sections 1066, 1113, 5380, chapter 115 and sub-divisions, were a part of the general law relating to the management and control of railroads in North Carolina, and were in full force and effect at the date of the passage of the act in question and still remain undisturbed as a part of the law applicable to the subject under consideration. Under the well established rule of construction, these sections must be construed as forming a part of the law relating to the enforcement of any legislation that may have been enacted in regard to the subject of fixing maximum rates.

In the case of Wilson *v.* Jordan, 124 N. C. 683, the court, in discussing this phase of the question, said:

"All acts of the same session of the legislature upon the same subject-matter are considered as one act, and must be construed together, under the doctrine of *'in pari materia.'* State *v.* Bell, 25 N. C. 506; Black Interp. Laws, § 86; End. Interp. Laws § 45; Cain *v.* State, 20 Tex. 355. They should be considered *in pari materia,* whether passed at the same session or not. Simonton *v.* Lanier, 71 N. C. 498; Rhodes *v.* Lewis, 80 N. C. 136. Where a former act has been repealed or has expired by its limitation, when it is *in pari materia,* it must be considered in connection with the last act, and, if necessary, as a part of it. Potter, Dwar. St., p. 190. 'It certainly appears strange,' said Williams, J., in a late case, 'that, when an act of parliament is *per se* abolished, it shall virtually have effect through another act. But in that case the former act was substantially re-enacted. Reg. *v.* Merionethshire, 6 Adol. & Ellis, 343. It does, indeed, seem to be the prevailing doctrine (and it is more rational in itself than consistent with coeval maxims) that where one statute refers to another, which is repealed, the words of the former act must still be considered as if introduced into the latter statute.' Potter, Dwar. St., p. 192.

"In Rex *v.* Loxdale, 1 Burrows, 447, it is held (Lord Mansfield delivering the judgment of the court), 'That where there are different statutes *in pari materia*, though made at different times, or even where they have expired, and not referring to each other, they shall be taken and considered together as one system, and as explanatory of each other.' The same doctrine is held in New York, Smith *v.* People, 47 N. Y. 330, which is very much in point."

Therefore, the sections which refer to the supervision and control of railroads by the corporation commission, when read in connection with the act of 1907, as the same should be, it appears that the members of the corporation commission as well as the Attorney General are charged with the duty of securing the enforcement of the provisions of the act of 1907, and it is made their special duty to secure the enforcement of the provisions of Section 4 of the passenger act; hence it necessarily follows that they are proper parties to this proceeding. This conclusion is sustained by the principles enunciated in the case of Smyth *v.* Ames, 169 U. S. 466-70. Prior to the enactment of the statute of the state of Nebraska to "regulate railroads, classify freight, to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads of the state and to provide penalties for the violation of this act," the legislature passed an act to regulate railroads, to prevent unjust discrimination, to provide a Board of Transportation and define its duty, etc. By this act the Attorney General, Secretary of State, the Auditor of public accounts, State Treasurer and Commissioner of public lands and buildings were constituted a Board of Transportation with power to appoint three secretaries to assist it in the performance of its duties and with authority to inquire into the management of the business of all common carriers subject to its provisions and obtain from such carriers full and complete information necessary to enable the Board thus established to perform its duties and to carry out the objects for which it was created.

Thus it will be seen that the Attorney General in that instance was not charged with the performance of any specific duty in regard to the enforcement of the rates in the state of Nebraska by the act which undertook to fix maximum rates, but that duty was imposed upon him as a member of the Board of Transportation by the provisions of a law which had been enacted prior to the passage of the act

fixing rates and that case is therefore on all fours with the case at bar.

In the case of Prout *v.* Starr, 188 U. S., 542, the court upheld a suit against the Board of Transportation and Attorney General of Nebraska arising out of the same statute involved in Smyth *v.* Ames, and in discussing the matter employed the following language:

"But by this appeal we are asked to declare that the Circuit Court had no jurisdiction because it appears, on the face of the bill, that the complaint is essentially against the state of Nebraska, and is in contravention of the Eleventh Amendment of the Constitution of the United States.

"It is a sufficient answer to this contention that it was made, considered and determined in Smyth *v.* Ames. In the opinion in that case it was said:

" 'Within the meaning of the Eleventh Amendment of the Constitution, these suits are not against the state, but against certain individuals charged with the administration of a state enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals, for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that Amendment. Pennoyer *v.* McConnaughy, 140 U. S., 1; *In re* Tyler, 149 U. S., 164, 190; Scott *v.* Donald, 165 U. S. 58, 68; Tindal *v.* Wesley, 167 U. S., 204, 220.' "

Suits and injunctions against the Attorney General of a state have been upheld in the recent cases of Railroad Commission of Louisiana *v.* Texas & Pacific Company, 144 Fed. Rep. 68 (Circuit Court of Appeals), and Consolidated Gas Company *v.* Mayer, 146 Fed. Rep. 150, 154. In the latter case it appears that the duty of the Attorney General with respect to the enforcement of the statute existed by virtue of his general duties imposed by a separate and antecedent statute.

In the case of Mississippi Railroad Company *v.* Illinois Central Railroad Company, 203 U. S., 335, 340, the court, among other things in discussing this question, said:

"The commission was created by the state of Mississippi under the authority of its constitution and laws for the pur-

pose of supervising, and, to some extent, controlling the acts of the railroads operating within the state. Such a commission is subject to a suit by a citizen. Reagan *v.* Farmer's Loan & Trust Co., 154 U. S., 363; Smyth *v.* Ames, 169 U. S., 466; Prout *v.* Starr, 188 U. S., 537."

In the case of Reagan *v.* Farmer's Loan & Trust Co., 154 U. S., 362, the Attorney General and the Railroad Commission of Texas were enjoined from the enforcement of the act. In that case it was strenuously insisted that it was a suit against the state and therefore in violation of the Eleventh Amendment of the Constitution of the United States. The Circuit Court as well as the Supreme Court held otherwise.

The Texas statute relating to the same (General Laws of Texas Ch. 51), reads as follows:

"Sec. 18. If any railroad, as aforesaid shall wilfully violate any other provisions of this act, or shall do any other act herein prohibited, or shall fail or refuse to perform any other duty enjoined upon it for which a penalty has not herein been provided, for every such act of violation it shall pay the state of Texas a penalty of not more than five thousand dollars.

Sec. 19. All of the penalties herein provided, except as provided in section 17, shall be recovered and suits thereon shall be brought in the name of the State of Texas in the proper court having jurisdiction thereof in Travis County * * * by the Attorney General or under his direction; and the attorney bringing such suit shall receive a fee of fifty dollars for each penalty recovered and collected, by him, and ten per cent. of the amount collected, to be paid by the state. * * * All fines and penalties recovered by the state under this act shall be paid into the treasury of the State.

Sec. 21. It is hereby made the duty of such Railroad Commission to see that the provisions of this act and all laws of this State concerning railroads are enforced and obeyed, and that violations thereof are promptly prosecuted, and penalties due the State therefor are recovered and collected. And said commission shall report all such violations with the facts in their possession to the Attorney General or any other officer charged with the enforcement of the laws, and request him to institute the proper proceedings; * * *

(a) It shall be the duty of the commission to investigate

all complaints against railroad companies subject hereto and to enforce all laws of this State in reference to railroads."

Section 1113, of the Revisal of North Carolina, provides that the commission, whenever in its judgment any corporation has violated any law, shall first give notice of such violation to the offending corporation, and in the event of a failure on the part of such corporation to comply with the law, "shall forthwith present the facts to the Attorney General, who shall take such proceedings thereon as he may deem expedient."

This provision is positive and must be construed as being mandatory. In this case the statute of North Carolina makes it clearly the duty of the Attorney General, when called upon, to prosecute any suit or action which may be deemed necessary to secure the enforcement of the laws of the State, in regard to the fixing of maximum rates. This section when construed in accordance with the rule laid down in the Reagan and Ames cases clearly charges the Attorney General with a duty in relation to the enforcement of the act in question.

In this connection it is well to consider the scope and meaning of the expression "specially charged with the execution of a state enactment." The Supreme Court in the Reagan case as well as the Ames case expressly held that the officers enjoined in those cases were state officers "specially charged with the execution of a state enactment." From what appears in those cases, it necessarily follows, that the words "specially charged" are not to be construed to mean that the Attorney General cannot be enjoined except in cases where the state statute has expressly commanded him to enforce the act by bringing suits for penalties or prosecuting misdemeanors mentioned in the act. He was only charged by his general duty as the law officer of the State and yet he was enjoined in language so broad as to include every attempt to enforce the penalties attending the violation of "House Roll 33."

In the Reagan case the Attorney General was not deprived of his discretion and reduced to a mere ministerial agent, as will appear by an examination of the Texas statute.

Likewise, an examination of the Nebraska statute of 1887 and the re-enactment of it into the Revised Statutes of Nebraska of 1893, chapter 72, Article 8, sections 1 to 23 fails to show that the Nebraska State Board of Transpor-

tation was in any way directed to enforce by criminal procedure the act of 1887 or any other act. It was held in that case that the Attorney General of Nebraska was specially charged with the enforcement of the penal clause of the act of 1893, relating to the maximum rate law known as "House Roll 33" merely because the law of 1893 imposed a penalty for the violation of the maximum rate law.

When we come to consider the statutes of North Carolina we find, to construe the same in accordance with the principles laid down in the Reagan case, Smyth *v.* Ames, Consolidated Gas Company *v.* Mayer, that the Corporation Commission and the Attorney General of North Carolina are specially charged with the enforcement of the acts of 1907.

It is inconceivable that a Circuit Court of the United States, in the exercise of its jurisdiction, should be powerless to afford a remedy to one who seeks to assert a right which is guaranteed by the Constitution of the United States. This is in no sense a suit against the state, nor can it be successfully contended that the state is in anywise a party in interest, in so far as the merits of the controversy are concerned. It cannot be reasonably insisted that this is a suit to prevent the state from enforcing any right which it possesses, nor can it be said to be a suit to compel the performance of an obligation of the state, nor does it in anywise involve a matter in which the state has a pecuniary interest; the parties in interest being, the complainant on the one side, and the travelling public on the other. Therefore, the questions presented are not such as to warrant the assumption that this court is without jurisdiction, and a careful study of the circumstances attending the adoption of the Eleventh Amendment, as well as the end to be obtained by the adoption of the same, show conclusively that those who were responsible for its adoption never dreamed that it could be used as a means of depriving an American citizen of a substantial right conferred upon him by the Constitution of the United States. The Eleventh Amendment, being a part of the Constitution of the United States, must be construed so as to give full force and effect to each and every provision of the instrument of which it forms a part. Any other construction of this Amendment would practically nullify that clause of the Constitution which provides that no state shall pass any laws impairing the obligation of con-

tracts, as well as the Fourteenth Amendment which, among other things, provides that "no state shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It cannot be that a state legislature can so frame an act as to deprive a citizen of a right vouchsafed to him by the Constitution of the United States, and it is equally unreasonable to contend that, a state legislature possesses the power by legislative enactment, to deprive this court of its jurisdiction, and the sooner these questions are definitely determined the better it will be for all parties concerned.

That there is a disposition on the part of some to do that, which, if successful, would not only impair the usefulness of the Federal Courts, but nullify certain provisions of the Constitution, is apparent. This situation is preductive of a feeling of unrest and a lack of confidence on the part of the people in the ability of the United States courts to fairly administer the law in accordance with the Constitution of the United States.

For the reasons stated, the court is of opinion that this is not a suit against the state within the meaning of the Eleventh Amendment, and that, therefore it has jurisdiction to hear and determine the isues raised by the pleadings.

It is charged in the bill that if the proposed rates are enforced complainant will suffer irreparable injury; that such rates are unreasonable, unjust and confiscatory and that the complainant is about to be deprived of its property without due process of law, and as a means of having its rights determined in an orderly and judicial way it comes into a court of equity and asks that an order be granted restraining the enforcement of the provisions of the act of 1907 until the final hearing of the cause.

The complainant insists that it should be protected against the irreparable injury it would sustain if the proposed rates should be put into effect pending the final hearing of the original suit in this cause. Among other things, it is alleged that, the legislature of North Carolina at its recent session passed acts regulating freight and passenger rates and that by virtue of the provisions of said acts it is about to be deprived of its property without due process of law and also

denied the equal protection of the laws. The complainant seeks to enjoin the enforcement of the rates prescribed by the act in question upon the ground that the statute prescribing the same is repugnant to the Constitution of the United States. It is contended that the lapse of any considerable length of time would expose it to innumerable suits by shippers and the travelling public for penalties, as well as subject it to the penalties prescribed by the statute. Complainant prays for an injunction against the Corporation Commissioners, the Attorney General and the Assistant Attorney General during the pendency of this cause.

On the 8th day of May, 1907, an order was entered restraining the defendants from enforcing the aforesaid act and at that time notice was issued to the defendants to appear before me on the 28th day of June, 1907, and show cause why the injunction thus granted, should not be continued until the final hearing.

In considering this motion it is incumbent upon the court, in the exercise of its discretion, to determine whether, under the circumstances, the complainant is entitled to the relief which it seeks, and also whether it will suffer irreparable injury in the event the court should refuse to continue the injunction until the final hearing.

That it is the duty of a court of equity to restrain the enforcement of an act which is alleged to be unconstitutional, when it is shown by the proof that the complainant will, pending a final hearing, suffer irreparable injury is a well established rule of such courts. In such cases, the court in order to avoid a multiplicity of suits, will restrain the enforcement of any act with respect to the same until the final hearing.

In discussing this phase of the question, the learned Justice who delivered the opinion in the case of Smyth *v.* Ames, *supra*, said:

"In these cases the plaintiffs, stockholders in the corporations named, ask a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the Constitution of the United States. Under the principles which in the Federal system distinguish cases in law from those in equity, the Circuit Court of the United States, sitting in equity, can make a comprehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that

would inevitably arise under the statute. The carrier is made liable, not only to individual persons for every act, matter, or thing prohibited by the statute, and for every omission to do any act, matter, or thing required to be done, but a fine of from one thousand to five thousand dollars for the first offense, from five thousand to ten thousand dollars for the second offence, from ten thousand to twenty thousand dollars for the third offence, and twenty-five thousand dollars for every subsequent offence. The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions of a single week would expose any company questioning the validity of the statute, to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all and without a multiplicity of suits, matters that affect, not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi public corporation by which such highway is maintained."

It is well to remember that the allegations in the bill filed by complainant are in many respects similar to those contained in the bill filed in that case.

In the case at bar it is shown that section four of the act, prescribes heavy and unusual penalties, the enforcement of which, for any considerable length of time in a court of law would practically bankrupt the complainant.

In addition to the allegations contained in the verified bill, the complainant has offered the affidavit of A. H. Plant, comptroller of complainant, as to the amount of its intrastate, as contradistinguished from its inter-state, business.

Among other things, Mr. Plant, says:

"That he is, and for some years past has been, comptroller of the Southern Railway Company, and as such has supervision over its accounts, and charge of its books, and that

the following is a true statement of the results of operation of Southern Railway Company in North Carolina during the year ending June 30, 1906, under the rates and classifications existing at that time:

Gross earnings from operation in North Carolina, including both interstate and intrastate	$12,043,727.13
Operating cost to earn one dollar of intrastate revenue in North Carolina was not less than	86.35¢

While it is impossible to state the exact cost to earn a dollar of intra-state revenue, it is certain that it costs much more than the average cost to do all business, and at least the above mentioned figures, as this affiant verily believes.

Gross earnings in North Carolina from intra-state traffic:

From passengers	$1,565,695.33
From freight	1,322,564.30
From mail	230,383.78
From express	169,474.89
From miscellaneous	36,507.44
Total gross revenue from intrastate traffic in North Carolina for said year	3,324,625.74
Minimum expense of earning this gross intrastate revenue, on the basis of 86.35¢ to earn one dollar	2,870,814.33
Maximum net earnings from intrastate traffic in North Carolina for said year, without allowing for taxes	453,811.41
Taxes chargeable to North Carolina for the fiscal year ended June 30, 1906, were	269,651.18
The proportion of intrastate gross earnings to total gross earnings in North Carolina was 27.60 per cent.	
27.60 per cent. of the total taxes above mentioned which should be charged to intrastate traffic shows intrastate taxes to have been for that year	74,423.73
Improvements and betterments not capitalized chargeable to North Carolina during the year for the purpose of keeping the property up to modern standard and without additions to it, amounted to	197,945.81

27.60 per cent. of which is assignable to intrastate traffic, or.....	$54,633.04
Total taxes and improvements and betterments not capitalized chargeable against intrastate traffic for said year.....	129,056.77
Leaving as the maximum net intrastate earnings in North Carolina for said year, after deducting the said proportion of taxes and the said proportion of improvements and betterments not capitalized.....	324,754.64
Applying to the above mentioned intrastate business in North Carolina for the year ended June 30, 1906, the passenger and freight rates proposed by the acts of the legislature of North Carolina passed during March of the current year, there would have been a loss of passenger revenue of .	275,055.53
And a loss in freight revenue of.....	21,691.64
Or a total of.....	296,747.17
Making the net earnings from intrastate operations under the proposed rates and classifications	28,007.47
During the said year the value of the physical properties of this company in North Carolina, according to the assessment made by the state for the purpose of taxation, was	26,134,865.00
The proportion of this tax value used for intrastate purposes should be ascertained on the basis of user, which is on the basis of the proportion of gross earnings from intrastate business to the total gross earnings from all business for said year in North Carolina, or 27.60 per cent. of the said assessed value, which amounts to.....	7,213,222.74
The maximum net revenue from intrastate traffic in North Carolina under the existing rates would only yield as interest upon said proportion of said tax value, per annum, 4.50 per cent.	
Under the proposed rates and classifications the net revenue from intrastate traffic in North Carolina would only yield as interest upon the said proportion of said tax value, per annum, .39 per cent.	

The affiant further says that the foregoing results of operation in the State of North Carolina for the year ended June 30, 1906, show a larger net result to the company than is fairly representative of the results of the company's operations in the future, for the reason that since the 30th day of June, 1906, the close of said fiscal year, there has been a large increase in the expenses of the company, due to increases in wages, and to the increase in cost of all material and supplies and other expenses, as will be shown by the following statement for the system:

For six months ended December 31, 1906, the gross earnings of the company increased over the same period of the previous year.....	$1,711,861.79
Whereas the operating expenses and taxes increased for the same period.....	2,623,979.77
Showing a decrease in net earnings for the six months mentioned, of.....	912,117.98

In addition to the foregoing increases in wages and other expenses, the company is confronted with still further very substantial demands for increases in wages. While the above figures are for the system, a proportionate part of said increase in expenses would apply to North Carolina."

It is insisted by counsel for defendants that Mr. Plant made certain reports to the Corporation Commission which are inconsistent with the affidavit which he now makes as to local business transacted by complainant in the State of North Carolina. In an affidavit filed by Mr. Plant on the 26th of June, 1907, in referring to the reports which he had previously made to the Corporation Commission, it is said:

"As no account of the difference in such costs was kept upon the books of this company and no attempt made in the company's books to separate the cost between the inter-state and the intra-state business, when called upon for statements of these expenses by the North Carolina Commission, such statements were necessarily made upon an assumed basis, with the statement that the results were approximate. And the basis assumed for these reports in North Carolina was the minimum amount stated in the decision above referred to of the Supreme Court of the United

States in Smyth *v.* Ames, 169 U. S. Subsequent investigation and study of the situation and consultation with men of experience have convinced me that the estimated basis made in the report to the commission in North Carolina is entirely too small, and that the minimum should not be less than is given in this affidavit. In fact, when all the conditions are considered and all the elements of increased expenses are given their due weight, I believe that the estimate given in this affidavit will be considerably below what is the real cost of doing such business. It is impossible to arrive at such costs accurately, as there are many of the elements of the expense which are common to all classes of business, and a division of expenses thus common to all classes of traffic must be made more or less upon arbitrary lines. For example: The general expense of doing all the business of the company cannot, with accuracy, be allocated as between the different classes of business, and the same is true of other elements of expense, such as maintenance; but it is safe to say that a reliable minimum can be reached, and this minimum is not, in my judgment, after much consideration of the subject, less than that above mentioned. This estimate of a minimum makes no allowance whatever for any increased cost of maintenance due to the increased wear and tear on the road bed and equipment incident to the more frequent starts and stops in connection with intra-state business. * * *

"The earnings from passengers of passenger trains in North Carolina embracing both inter-state and intra-state passenger business, are less than one dollar per train mile, and it is the usually accepted opinion among railroad men that a passenger train which does not earn from its passengers more than a dollar per mile is not a profitable train, the general impression being that a passenger train earning less than one dollar per train mile from passengers is run at a loss. Whether this is actually true or not, I believe it to be certain that it costs to earn a dollar of every class of passenger train revenue, intra-state as well as inter-state, more than the above mentioned figures of 86.35 cents."

When we come to consider the testimony of Mr. Plant we find that it is true that he made certain reports to the Corporation Commission which are not strictly in accord with the affidavits which he now makes. While this is so, it is also shown by the marginal notes of the reports of the

corporation commission, that the same were based only on an estimate and were not intended to be treated as matters of fact. If it had been shown that the witness had made two contradictory statements or inconsistent utterances as to matters of fact, then the question as to the veracity of the witness would arise, and under such circumstances, it would be the duty of the court to consider the same in determining the weight of such testimony as bearing upon the truth or falsity of the same, but inasmuch as these statements relate solely to a matter of opinion, no question of veracity arises, and when we consider the statements in question, together with the evidence of Mr. Plant, it cannot be said that the testimony which he now gives is calculated to impeach his character as a witness, nor can it be said that, such testimony tends to contradict (in the ordinary acceptation of the term), the statements which he made to the corporation commission in the first instance. The one is a matter of opinion—an estimate—and may vary with the conditions of one's study and investigation, and his opinion is valuable in proportion to the amount of study and investigation that he may make with respect to the matter about which he is testifying. While on the other hand, if he makes a contradictory statement as to a question of fact, such statement may be used for the purpose of discrediting him as a witness.

Our experience in human affairs teaches us, that, in matters of opinion men are likely to differ materially, and such difference does not tend in the slightest degree to affect the character of one who may have given expression to conflicting opinion at different stages of an investigation of a subject, the determination of which necessarily involves calculations that are based upon estimates, and which do not depend upon facts to support the same.

The testimony of Mr. Plant, is in the main, sustained by the testimony of the following persons who have filed affidavits in this cause: Frank Ney, general auditor Rock Island Railroad Co.; Erastus Young, general auditor, Union Pacific R. Co.; Mr. Krebs, general auditor, Illinois Central Railroad Co.; H. B. Spencer, Vice-president of complainant company; Mr. Earling, vice-president of the Chicago, Milwaukee & St. Paul R. Co.; Mr. Truesdale, President Del. & L. R. Co.; Mr. Harris, President C., B. & Q. R. Co.; Mr. Wickersham, president of the Atlantic & West Point R. Co.; Mr. Sullivan, comptroller C. & O. R. Co.

It is also shown by the affidavit of W. H. Tayloe, general passenger agent of complainant, that the rates now in force are the same which were in force during the whole of the year ended June 30, 1906, and that in no instance, are such rates unjustly, unreasonably, and unfairly high, and that in no instance are such rates greater than a reasonable compensation for the services rendered. Mr. Tayloe also states that the passenger tariff established by the act in question is unjustly, unreasonably, and unfairly low, and that the rates therein prescribed would not furnish the complainant a fair, just or reasonable compensation for the services rendered, or a reasonable or fair return on its property engaged in intra-state business. That if the rates so established are put into effect the revenue of complainant will be largely reduced and there would not be a sufficient increase in passenger business to compensate the complainant for the loss of revenue resulting therefrom.

It is also insisted by counsel for complainant that in the case of Smyth *v.* Ames, *supra*, it was shown that the evidence justified twenty per cent. higher as the proper basis, and that in the case of Chicago, Mil. & St. P. R. Co. *v.* Tompkins, 176 U. S. the contention of Mr. Plant is sustained.

In the case of Smyth *v.* Ames, *supra*, the Supreme Court in referring to methods similar to those employed by Mr. Plant and other witnesses in this cause, said:

"The conclusion reached by the Circuit Court was that the reduction made by the Nebraska statute in the rates for local freight was so unjust and unreasonable as to require a decree staying the enforcement of such rates against the companies named in the bill. Ames *v.* Union Pacific Railway Company, 64 Fed. Rep. 165, 189. That conclusion was based largely upon the figures presented by Mr. Dilworth, while he was secretary of the State Board of Transportation, as well as a defendant and one of the solicitors of the defendants in these causes. He was a principal witness for the Board. His general fairness and his competency to speak of the facts upon which the question before us depends are apparent on the record. He stated that the average reduction made by the statute on all the 'commodities of local rates' was 29.50 per cent.; and this estimate seems to have been accepted by the parties as correct. He estimated that the percentage of operating expenses on local business would exceed the percentage of operating expenses

on all business by at least ten per cent., and that it might go as high as twenty per cent. or higher. And this view is more than sustained by the evidence of witnesses possessing special knowledge of railroad transportation and of the cost of doing local business as compared with what is called through business. Indeed, one of those witnesses states that the cost of carrying local freight is four times as much as the cost of through freight per ton per mile; another, that the cost of the short haul is 'reasonably double the long haul.' If due regard be had to the testimony—and we have no other basis for our judgment—we are not permitted to place the extra cost of local business at less than ten per cent. greater than the percentage of the cost of all business."

Counsel for defendants offer no evidence to contradict the testimony produced by the complainant, save the report herein referred to as having been made by Mr. Plant to the Corporation Commission.

It is charged in the bill that the present rates were established with the approval of the corporation commission of North Carolina and this allegation is uncontradicted. This circumstance, taken in connection with the fact that the corporation commission had before it the reports made by Mr. Plant as to the amount of complainant's intra-state business, at the time the present rates were adopted, is worthy of consideration in determining the merits of this controversy, inasmuch as it appears that at the time the present rates were established *it was the judgment of the corporation commission that a general reduction of rates could not be made without injury to complainant*, and the court is unable to find anything from the record before it to show that the situation in North Carolina has so changed since that date as to justify a change of the rates which were deemed expedient at that time.

The issue thus raised, when stripped of irrelevant and extraneous matter, presents solely the question, as to whether the rates fixed by the legislature are unjustifiably and unreasonably low in view of the amount of money invested by complainant in such intra-state business, as well as the cost of operating its lines of road, together with the necessary expenses incurred in connection therewith, which are not, technically speaking, operating expenses, yet at the same time, should be considered in determining the reasonableness of the rates as being necessarily pertinent thereto. In

addition to these items, should be considered taxes and payments on account of casualties and accidents.

The unprecedented development and prosperity of the South at this time, necessitate double tracking as well as a general overhauling of the property of complainant, in order that it may be able to meet the demands thus occasioned. There has never been a period in the history of that section of the country when there was such an urgent demand for improved and increased railroad facilities as at the present time.

What the public demands at this time is increased facilities in the way of transportation of freight and passengers, and this is especially true in Western Carolina, a section of country which until 1881 was practically without railroad facilities. The development of the timber and mineral interests of this section since the completion of the Southern Railway, renders it highly important that we should not only have better railroad facilities, but in addition thereto, new lines of road constructed in order that the people of that section may be able to develop their properties. As a result of this development, it is to be presumed that there has been a large increase in the value of the real estate in that section of the country, which alone, inures to the benefit of the people of such territory.

It is no ordinary task to construct and operate a railroad in a mountainous region like that of Western Carolina. Some of these matters at this stage of the proceeding are pertinent to the questions at issue, and are worthy of consideration.

Much has been said by counsel for defendants, in regard to state sovereignty, and newspapers and state officials have undertaken to determine those questions by methods unknown to judicial procedure, and which, if permitted to prevail, would lead to demoralization of public and private business and would be in utter disregard of the rights of individuals as guaranteed by the Constitution of the United States.

In the famous case of Marbury *v.* Madison, Mr. Chief Justice Marshall, among other things, said:

"The government of the United States has been emphatically termed a government of laws, and not men. It will certainly cease to deserve this high appellation, if the

laws furnish no remedy for the violation of a vested legal right. * * *"

It can never be truthfully said that there is an interference with States' rights so long as the courts of the United States do no more than exercise the judicial power conferred upon such courts by Congress in pursuance of the constitution of the United States.

It is remarkable that any one should at this late day question the power of the courts to declare an act of a state or Federal legislature unconstitutional, when it is shown that it is repugnant to the Constitution; and it is well to remember that a North Carolina court was the first to announce the doctrine that the courts possessed such power, and soon thereafter the Supreme Court of the United States, in the case of Marbury *v.* Madison, *supra,* declared it to be the settled doctrine of this country.

In the North Carolina case, the Court of Conference (which was the highest court at that time), in Bayard *v.* Singleton, 1 N. C. Rep. 5 (Nov. Term, 1787), in discussing the power of the court to declare an act of the legislature unconstitutional, said:

"Another mode was proposed for putting the matter in controversy on a more constitutional footing for a decision, than that of the motion under the aforesaid act. The Court then, after every reasonable endeavor had been used in vain for avoiding a disagreeable difference between the legislature and the judicial powers of the State, at length with much apparent reluctance, but with great deliberation and firmness, gave their opinion separately, but unanimously, for overruling the afore-mentioned motion for the dismission of the said suits.

"In the course of which the judges observed that the obligation of their oaths and the duty of their office required them, in that situation, to give their opinion on that important and momentous subject; and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the legislature of the State, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.

"That they therefore were bound to declare that they considered that whatever disabilities the persons under whom

the plaintiffs were said to derive their title, might justly have incurred against their maintaining or prosecuting any suits in the courts of this State, yet that such disabilities in their nature were merely personal, and not by any means capable of being transferred to the present plaintiffs, either by descent or purchase; and that these plaintiffs being citizens of one of the United States, or citizens of this State, by the confederation of all the states, which is to be taken as a part of the law of the land, unrepealable by any act of the general assembly.

"That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die without the formality of any trial at all. That if the members of the general assembly could do this, they might with equal authority not only render themselves the legislators of the State for life, without any further election of the people, but from thence transmit the dignity and authority of legislation down to their heirs male forever.

"But that it was clear that no act they could pass could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time destroy their own existence as a legislature, and dissolve the government thereby established.

"Consequently the Constitution (which the judicial power was bound to take notice of as much as of any other law whatever), standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must, of course, in that instance, stand as abrogated and without any effect."

That the legislature has the power within the limitations fixed by the Constitution of the United States to prescribe maximum rates for railroads, cannot be denied. While this is so, it is equally true as was said by Judge Catron (afterwards a justice of the Supreme Court of the United States), in the case of Vanzant *v.* Waddell, 2 Yerger, 262-70:

"Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing

by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

In the case of Smyth *v.* Ames, *supra,* in referring to this phase of the question, it is said:

* * * "But despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a state enactment is in harmony with that law simply because the legislature of the State has declared such to be the case; for that would make the State legislature the final judge of the validity of its enactments, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding. Art. 6. The idea that any legislature, state or federal, can conclusively determine for the people and for the court that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law is in opposition to the theory of our institutions. The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

The complainant has invoked the jurisdiction of this court for the purpose of asserting a right which is guaranteed to it by the organic law of the land. This law is supreme and should be obeyed until the people of the United States through their legislatures shall deem it expedient to modify the same. Every official, state or federal, is required before entering upon the discharge of the duties of his office to take an oath to support and maintain the Constitution of the United States and the laws made in pursuance thereof,

and the state official who takes this oath, among other things, is required to state that he will support the constitution and laws of the state not inconsistent with the Constitution and laws of the United States. Under these circumstances, there can, and should be, no conflict between the state and federal courts.

If this were a suit in the state court and it should appear, as it does in this case, that the complainant was threatened with irreparable injury, the injunction would be continued until the final hearing as a matter of course, upon the theory that it is the duty of the court to preserve the *status quo* until there could be a final determination of the questions involved in the controversy. This is the well settled rule of the federal courts and is the universal practice in the state courts of North Carolina.

Counsel for defendants cite the case of Covington, &c., Co. *v.* Sanford, 164 U. S., 578. The court has carefully considered that case and is of opinion that it does not apply to the case at bar. Counsel also referred to the San Diego case, 174 U. S., as showing that the railroad company must show "beyond all doubt" that the rates complained of were confiscatory. This expression in the San Diego case refers to the rule by which the court should be governed on a final hearing, and has no reference to a hearing on a preliminary motion for an injunction to preserve the *status quo*. It was also established in that case that the rates complained of would admit of a return of six per cent. upon the value of the property.

While this court, sitting as a court of equity, possesses ample power to restrain the enforcement of an act of the legislature in a proceeding of this character, pending a final hearing, it should be borne in mind that the legislation of North Carolina relating to railroads and the fixing of rates for the same, contemplates that injunctions should be granted in cases like that under consideration, and the necessary means are provided by which the interests of the patrons of the road may be fully protected in such cases, in so far as freight rates are concerned.

It is provided under Sub-head B., "Injunctions, When Granted," Section 1082, as follows:

"No judge shall grant an injunction, restraining order or other process staying or affecting, during the pending of any appeal, the enforcement of any determination of the

corporation commission fixing rates or fares, without requiring as a condition precedent the executing and filing with the corporation commission of a justified undertaking in the sum of not less than twenty-five thousand dollars for any company whose road is of less length than fifty miles, and fifty thousand dollars for any company whose road is over fifty miles in length, conditioned that the company will make and file with the corporation commission a sworn statement every three months during the pending of the appeal of the items of freight, with names of shippers, carried over such company's road within the preceding ninety days, showing the freights charged and those fixed by the corporation commission; and in the event that the determination of the corporation commission appealed from is affirmed in part or in whole such company shall within thirty days pay into the treasury of North Carolina the aggregate difference between the freights collected and those fixed by the final determination of the matter appealed. (1899, c. 164, s. 7)."

The foregoing provision clearly indicates that it was the purpose of the legislature not to interfere with the remedy by injunction in cases where it might appear that the rates fixed were confiscatory in their character, and the only limitation with respect to the same is the provision that in cases where it is sought to restrain an act fixing freight rates that a bond should be required. (It may be that the State officials have overlooked this provision).

Under these circumstances, the court in addition to being required by the rules, practice and procedure in such causes to preserve the *status quo* pending the hearing, is admonished by the acts of the legislature that in all such cases, where it appears that complainant is about to suffer irreparable injury, that it is the policy of the law of North Carolina to restrain the enforcement of such legislation pending the hearing upon giving ample security for the payment of such sums as may be deemed to be necessary to protect the rights of those affected by the rates established.

While this provision of the North Carolina law affords ample provision for the protection of shippers of freight pending the final hearing, the statute is silent as to the traveling public, and while it is contemplated that the enforcement of any act fixing passenger rates may be restrained,

nevertheless the legislature in its wisdom did not deem it necessary to make any provision for protection of those whose rights might be affected in this respect by the granting of a temporary injunction. Thus it is clearly shown that it is not the policy of the legislature of North Carolina to go to the extent which the Federal courts have gone in such causes (notably in the case of Consolidated Gas Co. *v.* Mayer, 146 Fed. Rep.), in protecting the rights of the traveling public.

The allegations of the bill, which are supported by uncontradicted evidence, clearly show that if the present rates are permitted to be enforced, the complainant will suffer great and irreparable injury in the event that the act in question should ultimately be declared unconstitutional. And in such event, the difference between the proposed rate and the present rate would be a clear loss to the complainant, inasmuch as it would be impracticable for it to bring a suit to recover the difference between the proposed rate and the old rate against each individual who might in the meantime purchase a ticket, and the denial at this time of the remedy universally afforded by courts of equity, under such circumstances, would be to deprive complainant of a right guaranteed to it by the Constitution of the United States.

While a railroad is not entitled to earn a profit on every mile of its road, nor upon every article carried by it, nevertheless it is entitled to earn a reasonable profit upon the entire intra-state business in the State.

It is shown by the evidence that the gross revenue from intra-state business in North Carolina in 1906 was $3,324,625. It is also shown that the minimum expense of earning this amount should be on the basis of 86.35 cents on one dollar earned and the aggregate expense thus incurred would be $2,870,814.33; that the maximum net earnings from intra-state business in North Carolina, not making any allowance for taxes is $453,811.41; that the taxes chargeable to North Carolina for the fiscal year ending June 30, 1906, was $269,651.18; that the proportion of intra-state gross earnings to total gross earnings was 27.60 per cent.; that 27.60 per cent. of the total taxes which should be charged to intra-state traffic shows that the intra-state taxes should have been for that year $74,423.73; improvements and betterments not capitalized chargeable to North Carolina for the same year

for the purpose of keeping the property up to modern standard and without additions to it amounted to $197,056.77; 27.60 per cent. of this last item which is assignable to intrastate traffic is $54,633.04; thus making a total of taxes, improvements and betterments not capitalized, chargeable against intra-state traffic for said year, $129,056.77.

The evidence shows that the complainant will sustain a loss of revenue by the proposed passenger rates of $275,055.53, a net loss from freight of $21,691.64, making a total loss of $296,747.17. So it will be seen from the foregoing that the net earnings from intra-state operations under the proposed rates and classifications would only be $28,007.47.

That part of the complainant's property in North Carolina devoted to intra-state business was assessed for taxation in that State during the year ended June 30, 1906, at $7,213,222.74. In this connection it should be remembered that no class of property in North Carolina is assessed at its true value for taxation. Nevertheless, if we assume that the tax valuation of the property of complainant to be a proper method of ascertaining the value of its property chargeable to intrastate business, we find that the net earnings of complainant, under the proposed rates and charges for intrastate business, taking the year 1906 as a basis, would only amount to thirty-nine one-hundredths of one per cent. upon such valuation, before allowing anything for the payment of dividends upon the stock and interest on the bonds of complainant.

The complainant in this cause occupies a fiduciary relation to the holders of its mortgages, stocks and bonds. The holders of these investments and securities are as much entitled to the protection of the law as any private citizen who may have invested his money in the mercantile business or any other private enterprise. To hold otherwise, would be to discourage investments in those public enterprises which are indispensable to the development, progress and growth of the country. If it is to be held by the courts that those who invest their capital in public enterprises of this kind are to be denied the equal protection of the laws, then the construction of railroads and other public utilities by private capital would at once cease, and the government would be required to embark in the untried, if not hazardous undertaking, of owning and controlling, not only the rail-

roads of the country, but any other utilities which might be deemed necessary for the convenience and advantage of the public.

North Carolina has had a sad experience in attempting to operate railroads within her borders, and her efforts in that respect have proven disastrous in the extreme, and today, the only railroad property owned by the State is being operated under leases which are deemed to be much more advantageous to the State than any plan of operation which it could adopt under its own management and control.

The State of North Carolina undertook to construct and operate the Western Carolina railroad, but its efforts proved to be a dismal failure, and had it not been for the purchase of the same by the complainant, in all probability, it would never have been completed, and today, Western Carolina would be inaccessible to the outside world.

The court does not deem it proper at this time, to pass upon the validity of section one of the act relating to passenger rates, feeling as it does, that the cause should be referred to a master in order that all the facts bearing upon that question should be ascertained and reported by him, before a final determination as to the reasonableness of the rates imposed can be had.

Much has been said by counsel as to the power of the court in this cause to grant a temporary restraining order, as well as the expediency of the same.

There can be no doubt as to the true rule by which the court is to be governed when it appears that the complainant is about to suffer irreparable injury. In this instance, the act in question is challenged as being unconstitutional, and as the court has said, the evidence now before it is sufficient to justify it in continuing the order heretofore granted, until the final hearing. However, the court is not bound by this strict rule of construction in dealing with this question. In the case of Cotting *v.* Kansas City Stock Yards Company, 183 U. S. 83, Circuit Judge Thayer, who heard the case below, decided that the act in question was valid, and notwithstanding that the court in that case was of opinion that the act was constitutional and dismissed the bill, nevertheless, the learned judge granted an order restraining the enforcement of the act of the legislature until the matter could be determined by the Supreme Court. That por-

tion of the order embodied as a part of the final decree is as follows:

"The great importance of the questions involved in these cases will doubtless occasion an appeal to the Supreme Court of the United States, where they will be finally settled and determined. If, on such appeal, the Kansas statute complained of should be adjudged invalid for any reason, and in the meantime the statutory schedule of rates should be enforced, the stock yards company would sustain a great and irreparable loss. Under such circumstances, as was said in substance by the Supreme Court in Hovey *v.* McDonald, 109 U. S. 150, 161, it is the right and duty of the trial court to maintain, if possible, the *status quo* pending an appeal, if the questions at issue are involved in doubt; and Equity Rule 93 was enacted in recognition of that right. The court is of opinion that the cases at bar are of such moment and the questions at issue so balanced with doubt, as to justify and require an exercise of the power in question. Therefore, although the bills will be dismissed, yet an order will at the same time be entered restoring and continuing in force the injunction which was heretofore granted for the term of ten days, and if in the meantime an appeal shall be taken, such injunction will be continued in force until the appeal is heard and determined in the Supreme Court of the United States; provided that, in addition to the ordinary appeal bond, the Kansas City Stock Yards Company shall make and file in this court its bond in the penal sum of two hundred thousand dollars payable to the clerk of this court and his successors in office, for the benefit of whom it may concern, conditioned that in the event the decree dismissing the bills is affirmed, it will, on demand, pay to the party or parties entitled thereto all overcharges for yarding and feeding live stock at its stock yards in Kansas City, Kansas, and Kansas City, Missouri, which, it may have exacted in violation of sections four and five of the Kansas statute relative to stock yards, approved March 3, 1897, since an injunction was first awarded herein, to-wit, on April —, 1897; and that it will in like manner pay such overcharges, if any, as it may continue to exact in violation of said statute during the pendency of the appeal. * * *"

Thus it will be seen that in that instance, notwithstanding the fact that the circuit judge was of opinion that the statute challenged was valid, yet, in the exercise of his dis-

cretion, an order was made restraining the enforcement of the statute until there could be a final hearing of the same by the Supreme Court.

The action of Judge Thayer, in that case, affords a striking illustration as to the extent to which a court of equity will go in order to preserve the *status quo* and thus prevent irreparable injury in a cause where it has assumed jurisdiction. The Supreme Court held that Judge Thayer's action in continuing the restraining order, under the circumstances, was proper, and Mr. Justice Brewer, who delivered the opinion of the court, in referring to the action of the lower court, said:

"The learned circuit judge, in deciding the case, appreciated the importance of the questions involved, and although denying the relief sought by the plaintiffs, exercised his power of continuing the restraining order until such time as these questions could be determined."

It should be observed that the learned justice concedes to the Circuit Court the power to continue the restraining order until the questions involved could be determined. And the reasons for continuing the restraining order in the case at bar are much stronger than those which induced Judge Thayer to restrain the enforcement of the act in that case pending the final determination of the same by the Supreme Court.

Notwithstanding the fact that the court had at the hearing of this motion, considered section 4 of the rate act of 1907, and was of opinion that the same was unconstitutional; yet, during the preparation of this opinion, and before the court had expressed its views in respect to the same, it was called upon to determine the validity of that section in the case of *In re* Jas. H. Wood, and after carefully considering the same, reached the conclusion that the said section was on its face unconstitutional and void.

Inasmuch as the allegations of the bill, supported by the evidence, show that, unless the restraining order heretofore granted is continued until the final hearing, the complainant will suffer great and irreparable injury, in the event the act in question should be finally declared invalid, the court is of opinion, that such order should be continued until the final hearing; and in order that the traveling public may be fully protected in the event that the act should be ultimately declared to be valid, the complainant

will be required to give ample bond to secure the payment of a sufficient sum into the registry of the court to reimburse those who may purchase tickets of complainant in the meantime, a sum equal to the difference between the present rate and the proposed rate.

NOTE.

Subsequent to the granting of an order continuing the interlocutory injunction until the final hearing, to-wit, on the 29th day of July, 1907, the complainant through its counsel filed a petition asking a modification of the interlocutory injunction to the extent of permitting it to put in operation a two and one-quarter cent rate in accordance with the provisions of the act passed by the legislature of North Carolina.

It is stated in the petition substantially that the governor of the State had threatened to institute proceedings in the State court for the purpose of annulling the lease of the North Carolina Railroad Company and also to call a special session of the legislature with the view of securing the passage of additional legislation affecting the rights of the complainant; that a number of suits had been instituted in the State courts against complainant and its agents on account of its having complied with the terms of the decree of this court granting an interlocutory injunction; that the governor of the State had issued a circular letter to the Superior Court judges of the State, advising them that it was their duty to see that all parties who failed to comply with the provisions of the act of 1907 were prosecuted, regardless of the order which this court had made temporarily suspending the enforcement of the same; that these attacks on the part of the governor and State officials against the company and its agents and in the manner therein described, had had the effect of demoralizing the servants, agents and employees of the company to such an extent as to render it well nigh impossible for complainant to properly discharge the duties which it owed the public as a common carrier, and that owing to many other reasons stated therein the complainant was deterred from asserting the rights which were guaranteed it by the Constitution of the United States. For a more complete statement of facts reference is made to the petition which has been filed, and is a part of the record.

After considering the petition, the court made the following statement:

"The application now made to modify the injunctions heretofore granted in these causes present a condition of affairs unprecedented in the judicial annals of this country.

"After a full and complete hearing of the matters raised by the pleadings in these causes, injunctions, pending the hearing of the questions involved in the original suits, were granted. The Court, in granting such injunctions, followed the course approved by the Supreme Court of the United States in the cases of Smyth *v.* Ames, Reagan *v.* Farmers' Loan and Trust Company, Cotting *v.* Kansas Stock Yards Company, and Prout *v.* Starr, and followed by the Circuit Courts of the United States in numerous other cases.

"The effect of the order restraining the Corporation Commission of North Carolina, *et al.*, was to preserve the rights of the parties until the master to whom this cause had been referred could have an opportunity to report the facts and thereby enable the court to correctly determine whether the act in question is confiscatory, and, in order to protect the traveling public, the complainants were required to give ample bond and security to secure the payment into the registry of the court a sum sufficient to pay the difference between the present rate and the proposed rate to those who might in the meantime purchase tickets.

"It is unjust to say that the question of States' rights is involved in this controversy. It is equally unjust to insist that what the court has done in the premises was an interference on the part of the federal court with the State courts. However, on the other hand, there has been a manifest disposition on the part of the State officials to interfere with the federal court in its procedure to do equal justice between the complainants and the defendants, and in the exercise of those powers necessarily incident to the protection of its jurisdiction.

"If this kind of obstruction should prevail, and citizens are thus to be denied the rights guaranteed them by the Constitution of the United States, then those provisions of the Constitution would become a dead letter, as there would be no means of enforcing them.

"When the motion for an interlocutory injunction was

made in these causes there was full argument before me by counsel representing the complainant and by counsel representing the defendants, the members of the Corporation Commission, the Attorney General and the Assistant Attorney General of North Carolina. This argument lasted over several days and covered all points at issue. Upon this argument and my consideration of the case I entered the interlocutory injunctions. On a subsequent occasion the matter was again presented to me on the trial of a writ of *habeas corpus*. I then delivered a written opinion which states my views of the law. I feel no doubt as to the soundness of these views, nor as to the jurisdiction of this court, nor its rights and duty to enter the interlocutory decree, nor, in order to protect the jurisdiction of this court, to discharge on *habeas corpus* the persons who had been arrested by the State authorities for compliance with the orders of this court.

"The court still considers that it would be its duty to continue this protection whenever its action in the premises should be thus lawfully invoked. But, as the complainants, for the protection of whose rights the interlocutory decrees were entered, now move the court permission to surrender the protection of said order, to the extent indicated in their respective petitions, there is nothing for the court to do except to grant the permission prayed."

In view of the facts contained in the petition, the court at that time entered an order modifying the order theretofore granted in accordance with the request of the petitioner.

EXHIBIT C.

Provisions of North Carolina Statutes.	Provisions of Nebraska Statutes.
"The Corporation Commission shall have such general control and supervision of all railroad, street railway, steamboat, canal, express and sleeping car companies or corporations and of all other companies or corporations engaged in the carrying of freight or passengers, of all telegraph and telephone companies, of all public and private banks and all loan and trust companies or corporations, and of all building and loan associations or companies, necessary to carry into effect the provisions of this chapter, and the laws regulating such companies." (Revisal of 1905, sec. 1066.)	"That the board hereby created shall have authority to inquire into the management of the business of all common carriers, subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the board to perform the duties and carry out the objects for which it was created." * * * (Compiled Statutes of Nebraska, ch. 72, art. VIII, sec. 12.) "* * * said board (of transportation) shall have the general supervision of all railroads operated by steam in the State, and shall inquire into any neglect of duty or violation of any of the laws of this State by railroad corporations doing business in this State or by any officer, agent, or employee of any railroad cor-

poration doing business in this State." * * *

(Compiled Statutes of Nebraska, 1893, ch. 72, art. VIII, sec. 17.)

"The Commission, whenever in its judgment any corporation has violated any law, shall give notice thereof in writing to such corporation, and, if the violation or neglect is continued after such notice shall forthwith present the facts to the Attorney General, who shall take such proceedings thereon as he may deem expedient."

(Revisal of 1905, sec. 1113.)

No corresponding provision in Nebraska statutes.

"It shall be the duty of the Attorney General:

"1. To defend all actions in the Supreme Court in which the State shall be interested or is a party, and also when requested by the Governor or either branch of the General Assembly to appear for the State in any other court or tribunal in any cause or matter civil or criminal in which the State may be a party or interested."

(Revisal of 1905, sec. 5380, sub.-sec. 1.)

"The Attorney General shall appear for the State and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court in which the State shall be interested or a party, and shall also when requested by the Governor or either branch of the legislature appear for the State and prosecute and defend in any other court or before any officer any cause or matter, civil or criminal in which the State may be a party or interested.

(Compiled Statutes of Nebraska, 1893, ch. 83, art. V, sec. 1a.)

"The Attorney General may on his own motion or whenever thereunto requested by any officer of the Executive Department having charge of any official bond, contract or matter shall upon a breach thereof prosecute any official bond deposited in any office of the Executive Department or any contract in which the State is interested and may and when so requested shall bring, prosecute and defend for the State any suit, matter or thing, civil or criminal, in which the State is interested or relating to any matter connected with the Executive Department."*

(Ch. 83, art. V, sec. 2.)

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* Sec. 1 of Art. 5, of the Constitution of Nebraska provides that "The Executive Department shall consist of a Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Superintendent of Public Instruction, Attorney General, and Commissioner of Public Lands and Buildings."

"At the request of the * * * Corporation Commissioners * * * he (Attorney General) shall prosecute and defend all suits relating to matters connected with their departments."

(Revisal 1905, sec. 5380, sub.-sec. 2.)

No corresponding provision in the Nebraska statutes authorizing the Board of Transportation to require the services of the Attorney General.

(It shall be the duty of the Attorney General) "to consult with and advise the Solicitors, when requested by them in all matters pertaining to the duties of their office."

(Revisal 1905, sec. 5380, sub.-sec. 4.)

"The Attorney General shall consult with and advise the District Attorneys when requested by them in all matters pertaining to the duties of their office; * * *"

(Compiled Statutes of Nebraska, 1893, ch. 83, art. V, sec. 3.)

"* * * The North Carolina Corporation Commission shall publish the rates fixed by this act for the several railroads operating in this State on or before the first day of June, 1907."

(Sec. 2 of act of March 2, 1907, in respect to passenger rates.)

No corresponding provision in the Nebraska rate statute involved in Smyth *v.* Ames.

"That mileage books of one thousand miles in each book shall be kept on sale at such railroad ticket offices in North Carolina as shall be named and designated by the Corporation Commission of North Carolina and when such mileage book is purchased it shall be good in the hands of any person or persons named therein on all railroads on which the fare is the same as or less than the fare on the road of the company selling such mileage book; * * *"

(Sec. 3 of the act of March 2, 1907, in respect to passenger rates.)

No corresponding provision in the Nebraska rate statute involved in the case of Smyth *v.* Ames.

"That the Corporation Commission created by the laws of North Carolina shall not in fixing the maximum rates and charges * * * permit or allow any such common carrier to charge, * * * a greater * * * rate for the transportation of any article * * * where the initial point of shipment is on the road or line of one common carrier in this State and the terminal point of said shipment is on the line or road of another common carrier in this State, than is the sum of the present local rates now established, prescribed or approved by said Corporation Commission, less a reduction of 25 per centum. * * *"

(Sec. 1 of the act of March 9, 1907, in respect to freight rates.)

No corresponding provision in the Nebraska rate statute involved in the case of Smyth *v.* Ames.

"The Corporation Commission is hereby directed to prepare and publish the tariff of rates, charges and tolls to be charged and collected by railroad companies in this State as authorized by this act on or before July 1, 1907."

(Sec. 5 of the act of March 9, 1907, in respect to freight rates.)

No corresponding provision in the Nebraska rate statute involved in the case of Smyth *v.* Ames.

Office Supreme Court, U. S.
DEC 18 1907

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 474.

THOMAS F. HUNTER, SHERIFF OF BUNCOMBE COUNTY, STATE OF NORTH CAROLINA, APPELLANT,

vs.

JAMES H. WOOD, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

BRIEF FOR APPELLEE.

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ALEX. P. HUMPHREY,
WALKER D. HINES,
Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 474.

THOMAS F. HUNTER, SHERIFF OF BUNCOMBE COUNTY, STATE OF NORTH CAROLINA, APPELLANT,

vs.

JAMES H. WOOD, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

Statement.

This case is an appeal from an order of the court below discharging appellee from the appellant's custody.

In the Circuit Court of the United States for the Eastern District of North Carolina the Southern Railway Company, as complainant, instituted a suit in equity against the Attorney General, Assistant Attorney General, and members of the Corporation Commission of North Carolina, seeking to prevent the enforcement of two North Carolina statutes of 1907, one providing for the reduction of passenger rates (and hereinafter referred to as the passenger-rate statute) and the other providing for the reduction of joint freight rates (and hereinafter referred to as the freight-rate statute). The grounds alleged for the relief sought were that

the enforcement of those statutes, or either of them, would deprive the complainant of its property without due process of law, would deny to it the equal protection of the laws, and would in other respects contravene the Constitution of the United States. This suit is hereinafter referred to as the Rate suit.

Upon motion therefor, and upon the bill and answer as affidavits, and upon numerous other affidavits filed by the complainant, the court entered an order granting an interlocutory injunction, whereby, until the further order of the court, the defendants and all other persons were restrained from taking any steps to enforce the rates provided for in either of the statutes, and the railway company was directed to give to each person purchasing a ticket a transferable coupon representing the sum which such person, or his transferee, would, upon a final decision in the cause upholding the validity of the passenger-rate statute, be entitled to receive, and required full reports showing the revenues collected in excess of the rates provided for by either of the statutes.

Thereafter, and while the interlocutory order was in effect, the appellee, James H. Wood, a ticket agent of the Southern Railway Company, sold a ticket for intrastate transportation at a rate in excess of the rate provided by the passenger-rate statute and gave the purchaser a coupon in accordance with the provisions of the order referred to. For this act Wood was arrested upon the charge of violating the passenger-rate statute. He was tried, convicted, and sentenced by the police justice at Asheville, N. C., to serve a term of thirty days in the chain gang.

Thereupon, in accordance with Wood's petition, a writ of *habeas corpus*, directed to the sheriff of Buncombe county, was issued by the judge of the court below, and after return thereof and due hearing thereon the court below ordered that Wood be discharged from custody upon two grounds: First, that the act for which he was in custody had been done in

pursuance of an order of a court of the United States, and, second, that he was in custody in violation of the Constitution of the United States. From this order this appeal is prosecuted.

The origin and development of this case are stated in detail in the brief of associate counsel on file.

In discharging the prisoner the court stated its decision on two grounds:

First, that the act for which he was in custody had been done in pursuance of an order of a court of the United States, and, *second*, that he was in custody in violation of the Constitution of the United States.

From this order this appeal is prosecuted.

ARGUMENT.

We will discuss first the proposition that Wood was in custody for an act done in pursuance of an order of a court of the United States; second, the proposition that Wood was in custody in violation of the Constitution of the United States.

I.

ORDER OF DISCHARGE PROPER BECAUSE WOOD WAS IN CUSTODY FOR AN ACT DONE IN PURSUANCE OF AN ORDER OF A COURT OF THE UNITED STATES.

Upon this proposition we understand the contention of appellant to be that the circuit court of the United States had no jurisdiction to entertain the Rate suit, or to make the order of injunction, or to interfere in any way with the enforcement, by criminal proceedings, of the so-called "criminal laws of North Carolina."

1. THE FEDERAL COURT HAD JURISDICTION OF THE RATE SUIT.

(a) The subject-matter of the Rate suit was the protection of the railway from being subjected to public use without the just compensation secured by the Constitution, and this was a subject-matter within the jurisdiction of the Federal court.

The following propositions are now too well settled for discussion: The question whether a legislative enactment fixing rates affords just compensation is a question for judicial determination. A suit in equity is an appropriate mode of trying this judicial question. A circuit court of the United States is a proper tribunal to hear and determine a suit in equity involving this judicial question. Upon these propositions it is sufficient to cite *Chicago, etc., R. Co. v. Minnesota*, 134 U. S., 418; *Reagan v. Trust Co.*, 154 U. S., 362; *Smyth v. Ames*, 169 U. S., 466, and *Chicago, etc., Co. v. Tompkins*, 176 U. S., 167.

It follows, therefore, that the subject-matter of the Rate suit came within the jurisdiction of the Circuit Court of the United States for the Eastern District of North Carolina, sitting as a court of equity.

(b) A long line of decisions of this court sustains jurisdiction in similar suits against similar parties and seeking similar relief.

In *Reagan v. Farmers' Loan and Trust Company*, 154 U. S., 362, the jurisdiction was upheld in suits by trustees of railroad mortgages against the railroad companies, the Railroad Commission, and the Attorney General of Texas.

In *Smyth v. Ames*, 169 U. S., 466, the jurisdiction was upheld in suits by railroad stockholders against the railroad

companies, the Board of Transportation, and the Attorney General of Nebraska.

In *Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins*, 176 U. S., 167, the jurisdiction was exercised in a suit by a railway company against the State Board of Railroad Commissioners and the Attorney General.

In *Prout v. Starr*, 188 U. S., 537, the jurisdiction was upheld in a suit similar in all respects to *Smyth v. Ames*, and this court specifically affirmed the lower court's decree restraining the Attorney General from conducting a proceeding to impose penalties.

In *McNeill v. Southern Railway Co.*, 202 U. S., 543, the jurisdiction was upheld in a suit by a railway company against the Corporation Commission of North Carolina.

In Mississippi Railroad Commission v. Illinois Central R. Co., 203 U. S., 335, the jurisdiction was upheld in a suit by a railway company against the Mississippi Railroad Commission.

While, of course, the precise relation sustained by the State officers to the statutes or orders complained of varied according to the provisions of the laws of the various States, yet, as will be pointed out below, there is no fundamental or logical distinction between the cases cited and the present Rate suit. Such distinctions as exist between the present Rate suit and some of the cases cited are immaterial, and with respect to other of the cases cited are entirely lacking. It is impossible to suggest any distinction between the present Rate suit, on the one hand, and *Smyth v. Ames* and *Prout v. Starr*, on the other hand, which would defeat the jurisdiction in the present case while sustaining the jurisdiction in those cases. Those cases are strictly similar to the present Rate suit, except that in some respects the present suit is less open to jurisdictional objections than those cases were.

(c) The jurisdiction of suits against similar defendants and for similar relief has become a settled principle of Federal jurisprudence and for many years has been acted upon by the inferior Federal courts.

Omitting the cases subsequently appealed to this court and mentioned under the preceding heading, we call attention to the following cases in the circuit courts of the United States:

Mobile & Ohio R. Co. *v.* Sessions, 28 Fed. Rep., 592. (Suit against members of Mississippi Railroad Commission.)

Chicago, Milwaukee & St. P. R. Co. *v.* Becker, 32 Fed. Rep., 849; 35 Fed. Rep., 885. (Suit against members of Railroad and Warehouse Commission of Minnesota.)

Chicago & Northwestern R. Co. *v.* Dey, 35 Fed. Rep., 866. (Suit against Railroad Commissioners of the State of Iowa.)

C., B. & Q. R. Co. *v.* Dey, 38 Fed. Rep., 656. (Suit against Railroad Commissioners of Iowa.)

Southern Pacific Co. *v.* Board of Railroad Commissioners of California, 78 Fed. Rep., 236; 87 Fed. Rep., 31.

Wilmington & Weldon R. Co. *v.* Board of Railroad Commissioners, State of North Carolina, 90 Fed. Rep., 83.

Metropolitan Trust Co. *v.* Houston & T. C. R. Co., 90 Fed. Rep., 683. (Suits against members of Railroad Commission and the Attorney General of Texas.)

Northern Pacific R. Co. *v.* Keyes, 91 Fed. Rep., 47. (Suit against Board of Railroad Commissioners of North Dakota.)

Western Union Telegraph Co. *v.* Myatt, 98 Fed. Rep., 335. (Suit against the members of the Court of Visitation and the State Solicitor of Kansas.)

Wallace *et al. vs.* Arkansas Central R. Co., 118 Fed. Rep., 422. (Decision of Circuit Court of Appeals affirming decree for complainant in a suit against

members of the Board of Railroad Commissioners of the State of Arkansas.)

Louisville & Nashville R. Co. *v.* Brown, 123 Fed. Rep., 946. (Suit against the members of the Railroad Commission of the State of Florida.)

Consolidated Gas Co. *v.* Mayer, 146 Fed. Rep., 150. (Suit against the New York Gas Commission and the Attorney General of New York and the District Attorney of New York City.)

Railroad Commission of Louisiana *v.* Texas Pacific R. Co., 144 Fed. Rep., 68. (Decision of Circuit Court of Appeals, Fifth District, affirming decree in favor of appellee.)

Houston & T. C. R. Co. *et al. v.* Storey *et al.*, 149 Fed. Rep., 149. (Suits against members of the Texas Railroad Commission.)

Most of the cases cited under this heading related to restraining the enforcement of rates fixed by railroad commissions themselves, but if any question ever existed as to whether the Federal courts had the same power over rates fixed by act of legislature as over rates fixed by a railroad commission acting under legislative authority, that question has been put at rest by the decisions of this court in *Covington, &c., Co. v. Sandford*, 164 U. S., 578, *Smyth v. Ames* and *Prout v. Starr*. In other respects there may be unimportant differences between some of the cases cited and the present Rate suit; but, as will be shown below, there is no fundamental or logical distinction which would justify the entertaining of jurisdiction in those cases and the denial of jurisdiction here.

(d) The fact that the Rate suit sought to prevent the institution of judicial proceedings by State officers did not defeat the jurisdiction, and this has been repeatedly held by this court.

The idea is now suggested in some quarters that a suit against State officers to prevent them from enforcing by

judicial proceedings in the State court rates made by or under State legislative enactment, but in conflict with the Constitution of the United States, is a suit against the State itself in violation of the Eleventh Amendment. This idea seems to proceed upon the theory that the doctrine of *Osborn v. Bank of the United States*, 9 Wheat., and since repeatedly confirmed, that

> "an officer of a State may be enjoined from executing a statute of the State which is in conflict with the Constitution of the United States when such execution would violate and destroy the rights and privileges of the complainant,"

is restricted to cases of some physical interference, in the nature of tort, with property rights, and does not extend to instances where the execution of the statute can be accomplished only by the institution of judicial proceedings in the State court. This idea, if correct, would overthrow practically all of the decisions of this court and of the inferior Federal courts in rate cases. In none of those cases could the rates complained of have been enforced except by the institution of judicial proceedings in the State courts, and in many of those cases no physical act, even of a preliminary character, remained to be done by the State officers.

For example, in *Smyth v. Ames* and *Prout v. Starr* the statute required no preliminary act by the Board of Transportation or the Attorney General, and no act whatever remained to be done except to enforce those rates by the institution of proceedings, either civil or criminal, in the courts of the State.

The erroneous assumption has been suggested that this court intended by its decision in the case of *In re Ayers*, 123 U. S., 443, to hold that it was necessarily a suit against the State itself to restrain the institution by State officers of judicial proceedings in a State court to enforce a statute con-

trary to the Constitution of the United States. That decision, however, does not justify such an assumption.

That case was an original proceeding in this court by the Attorney General of Virginia for a writ of *habeas corpus* to procure his discharge from custody under commitment of a circuit court of the United States for contempt of a decree rendered in the suit of *Cooper et al. v. Marye et al.* In this suit complainants, as owners of certain Virginia bond coupons, sought to restrain the Attorney General and the Commonwealth attorneys from instituting suits in accordance with a statute of Virginia, which directed those attorneys to institute suits against all taxpayers tendering such coupons in payment of their taxes. The bill alleged that this step, together with numerous other activities of the State set out in the bill, amounted to a repudiation by the State of its debt. The question for decision was whether the suit was a suit against the Attorney General and the Commonwealth attorneys personally to prevent them from enforcing an unconstitutional statute or was in substance a suit against the State of Virginia.

The court first pointed out (pages 493, 497) that the statute which the Attorney General and the Commonwealth attorneys were seeking to enforce was not unconstitutional, and for that reason the court held (page 497) that the bill

> "does not allege any ground of equitable relief against the individual defendants for any personal wrong committed or threatened by them."

The court had no occasion to hold, and did not hold, that it would be a suit against the State to sue State officers to prevent them from enforcing an unconstitutional statute. The court held that, the relief not being sought against the defendants in their personal capacity (because the mere institution of suits under a constitutional statute could not be complained of), the object of the bill was

> "by injunction indirectly to compel the specific performance of the contract" [of the State of Virginia]

> "by forbidding all those acts and doings which constitute breaches of the contract" (p. 502).

The court, having held that the suit was in substance a suit against the State, proceeded to point out how the restraining of the State officers from instituting judicial proceedings would necessarily accomplish the purpose sought, to wit, the specific performance of the State's contract. Thus the court held that the only right asserted was in substance asserted against the State itself, and that the only remedy sought was in substance a remedy which would compel the State itself to perform that right. All the observations of the court in that case with respect to the restraining of suits by State officers should be considered in the light of the circumstances there presented. Those observations cannot apply where the effort is to prevent State officers from enforcing an unconstitutional statute, and, if so applied, that case is necessarily at variance with the rate cases in this court and in the lower courts, because the substantial effect of all those cases has been the prevention of the institution by State officers of judicial proceedings in the State courts.

The reason which, notwithstanding the Eleventh Amendment, justifies an action or suit against a State officer to obtain redress for or to prevent steps by him in the execution of an unconstitutional statute was stated as follows in *Poindexter v. Greenhow*, 114 U. S., 270:

> "A defendant sued as a wrong-doer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the State which con-

> stitutes his commission as its agent, and a warrant for his act. This the defendant, in the present case, undertook to do. He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States Treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character; and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defense" (p. 288).

It is plain that there is no logical distinction, as far as the Eleventh Amendment is concerned, between (1) an action for damages for a tort committed in the execution of an unconstitutional statute; (2) a suit to restrain commission of a tort in the execution of an unconstitutional statute, and (3) a suit to restrain the execution of an unconstitutional statute by the institution of judicial proceedings. When a court of equity is called upon to consider whether a suit of class 2 or class 3 can be maintained the court must consider whether such a showing is made as to establish jurisdiction in equity, but the decision of this question does not involve the application of the Eleventh Amendment.

Let us assume the existence of a statute which is unconstitutional and which may be enforced by a State officer by seizing property of the person against whom the statute is directed, or by instituting judicial proceedings against that

person. If the officer seizes the property, an action for damages will, of course, lie against him. If the officer threatens to seize the property and the circumstances are such that the seizure would leave the owner without any adequate remedy at law a court of equity will entertain a suit to determine the right of the complainant and to enjoin the seizure. If the officer threatens to bring a myriad of actions to effectuate such seizures and these actions would be so numerous and vexatious as that the owner's remedy by way of a separate defense to each of these actions would be inadequate, then a court of equity will entertain a suit to determine the right claimed by the bill and to restrain the multiplicity of actions, but the Eleventh Amendment is no more involved in the determination of jurisdiction with respect to the suit to restrain a large number of actions than it is with respect to the suit to restrain a direct seizure of the property. In both instances the question is whether a sufficient showing is made to justify the intervention of a court of equity.

As will be pointed out below, the intervention of a court of equity in a case like the present is of paramount importance, and no greater injury to property can be imagined than the injury which would result from the enforcement of such statutes as are here involved by the institution of the innumerable proceedings which would be possible under the statutes.

Each of these statutes gives individuals aggrieved by violation of the statutes the right to recover heavy penalties of the railroad company. If the statute is unconstitutional, it cannot be questioned that a court of equity has the right to entertain a suit on behalf of the railroad company and against the individuals threatening to sue for the penalties or against the representatives of the whole class of such individuals to determine the right of the railroad company and to prevent the great injustice of a vast multiplicity of separate proceedings in each of which the same defense would have to be

made. If a court of equity has the jurisdiction to entertain such a suit against individuals to prevent the execution by those individuals of an unconstitutional statute, certainly the court has the right to entertain a similar suit against State officers, because, as shown in *Poindexter v. Greenhow*, a State officer in the execution of an unconstitutional statute stands simply upon the footing of an individual.

If the Eleventh Amendment had the effect of prohibiting the Federal courts as courts of equity from entertaining suits to restrain State officers from proceeding by vast numbers of separate judicial proceedings to enforce unconstitutional enactments, then an easy way exists whereby the States may evade all the limitations put upon their powers by the Federal Constitution.

In the case of *Mississippi Valley Railroad Commission v. Illinois Central R. Co.*, 203 U. S., 335, this court affirmed a decree enjoining the members of the Mississippi Railroad Commission from proceeding by suit or otherwise to enforce an order which involved an unreasonable interference with interstate commerce. If the Eleventh Amendment had the effect of preventing such injunctions, the States could interfere with interstate commerce to an almost unlimited extent. They could provide for enforcement of the acts unconstitutionally interfering therewith by the institution of large numbers of separate proceedings, and the multiplicity, vexation, expense, and uncertainty of all these proceedings, even aside from the question of penalties, would deter the railroad companies from disobeying such unconstitutional requirements, and the result would be that interstate commerce would be hampered, contrary to the Constitution of the United States at the will of the States, and such unconstitutional action could always be sheltered by refuge under such a construction of the Eleventh Amendment.

(e) *The fact that the Rate suit sought to prevent the institution of criminal proceedings on behalf of the State did not defeat the jurisdiction, and this has been repeatedly held by this court.*

In *Reagan v. Trust Co.*, 154 U. S., 362, it appeared that the Texas statute provided, in section 14, that if any railroad, its agent or officer, should charge a greater rate than is fixed by the Railroad Commission, such company, agent, or officer should be deemed guilty of extortion, and should forfeit and pay to the State of Texas a sum of not less than $100 nor more than $5,000 and various other penalties or forfeitures as imposed by other sections of the statute. By section 19 of the act it was provided that all of the penalties (except those provided in section 17 to be recovered by individuals aggrieved) should be recovered and suits thereon should be brought in the name of the State of Texas in the proper court by the Attorney General or under his direction. The decree enjoined the Attorney General "from instituting or authorizing, or directing any suit or suits, action or actions, against the defendant railroad company for the recovery of any penalties under and by virtue of the provisions of the act." This court affirmed that decree.

In *Smyth v. Ames*, 169 U. S., 466, the statute prescribing the rates complained of provided in section 9 that any common carrier violating the statute should upon conviction thereof "be fined in any sum not less than $1,000 nor more than $5,000 for the first offense, and for the second offense not less than $5,000 nor more than $10,000, and for the third offense not less than $10,000 nor more than $20,000, and for every subsequent offense and conviction thereof shall be liable to a fine of $25,000; provided that in all cases under this act either party shall have the right of trial by jury." The Supreme Court of Nebraska considered this section of this statute in State *v.* Missouri Pacific R. Co., — Neb., —; 90 Northwestern, 877, and said:

"Where the legislature has not indicated a preference, penalties and forfeitures may be recovered by the State in either civil or criminal actions, but the rule with respect to fines is different. The primary definition of a fine is a pecuniary punishment inflicted by the sentence of a court exercising criminal jurisdiction, and this is the sense in which the term is used in common speech. We do not remember having ever heard the action of a court giving judgment in a civil case described by the use of the word 'fine.' It was, of course, within the power of the legislature to provide for the enforcement of the law by civil action, but the evidence that it intended to do so is entirely wanting. The language it employed is significant. It spoke in the terminology of the criminal law. * * * The criminal code expressly declares that all fines therein provided for shall be enforced by criminal action and it was beyond all doubt the intention of the legislature that the punitive provisions of the act in question (section 9 of house roll 33) should be enforced in like manner" (p. 878).

In section 398 of the Criminal Code of Nebraska the offenses denounced by section 9 of this statute were indictable offenses, and under sections 578 and 579 of the Criminal Code of Nebraska it would seem that these offenses could also be prosecuted by the ordinary information for crimes, misdemeanors, and offenses.

In *Smyth v. Ames* the Attorney General of Nebraska was "enjoined from bringing, aiding in bringing or causing to be brought, any proceeding by way of injunction, mandamus, civil action or indictment, against said companies or either of them, or their receivers, for or on account of any action or omission on their part commanded or forbidden by said act."

This court affirmed that decree.

The same statute and an injunction of similar character was involved in the case of *Prout v. Starr*, 188 U. S., 537. The Circuit Court upon a supplemental bill extended the order of injunction to Prout, who was the successor as At-

torney General of Smyth, who had originally been made defendant to the cause. Prout appealed and claimed the right, notwithstanding the injunction, to institute penal proceedings in the State court. This court affirmed the decree of the Circuit Court, and held that in view of the proceeding in the Federal court Prout, as Attorney General, had no right to institute a proceeding in a State court to recover penalties for alleged violation of the rate statute, and said:

> "The jurisdiction of the Circuit Court could not be defeated or impaired by the institution by one of the parties of subsequent proceedings, whether civil or criminal, involving the same legal questions in the State court" (p. 544).

In *McNeill v. Southern Railway Co.*, 202 U. S., 543, it appeared that the Corporation Commission of North Carolina had adopted a regulation unreasonably interfering with interstate commerce.

Section 1086 of the North Carolina Revisal of 1905 provided that if any railroad company should violate a regulation of the Commission and failed upon full notice to make full recompense for the injury done thereby such company should incur a penalty for each offense of $500. Section 1087 provided that any railroad company refusing to obey any regulation of the Commission should, in addition to the other penalties, forfeit the sum of $500 for each offense, to be recovered in an action to be instituted in the name of the State on the relation of the Corporation Commission, and that each time such company should continue to violate any such regulation should be a separate offense.

The Circuit Court entered a decree whereby the court "perpetually enjoined the enforcement of the order of the Corporation Commission and the bringing of actions to recover penalties or damages for a violation of that order" (p. 547). That decree was affirmed by this court, which in the course of its opinion pointed out that the jurisdictional

amount of $2,000 was involved, because, among other things, the controversy involved "the right to enforce against the railway company the payment of statutory penalties much in excess of $2,000."

In *Mississippi Railroad Commission v. Illinois Central R. Co.*, 203 U. S., 235, the Commission and its members and clerks were enjoined from enforcing an order of the Commission compelling the complainant railway company to stop certain of its trains at a designated station, the order being held to be an illegal interference with interstate commerce.

Section 4331, Annotated Code Mississippi (1892), provides that it shall be the duty of the Commission "to see that all the laws, civil and penal, whether contained in this chapter or not, affecting railroads and other common carriers, are complied with and to prosecute all offenders."

Section 4329, Annotated Code of Mississippi (1892), provides:

> "If any railroad or other common carrier * * * shall fail to comply with any lawful order of the Commission or to conform to any of its resonable rules and regulations * * * it shall be liable to a penalty of five hundred dollars for every such failure or overcharge not otherwise punished, to be recovered by action in the name of the Commission in any county where such failure may occur or overcharge be made; * * *"

It is certainly too late now to contend in this court that the enforcement of a rate statute even by criminal process may not be restrained by the Federal court.

The general doctrine that criminal proceedings as distinguished from civil proceedings may not be enjoined is a doctrine which has no relation to the Eleventh Amendment, but which relates exclusively to the powers of courts of equity and is a doctrine which applies equally to the Federal courts, the State courts, and the English courts.

The doctrine had its origin in the idea that the jurisdiction of a court of equity is confined to the protection of property rights. This is made clear by the discussion of the subject in the case of *In re* Sawyer, 124 U. S., 200, where it was declared that "the office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or pardon of criminals, or misdemeanors, or over the appointment of public officers."

In that case the question before the court was whether the United States Circuit Court, as a court of equity, had jurisdiction of a bill to stay a hearing before a committee of a city council of charges against the complainant, who was a city officer, and to prevent the removal of the complainant from his office. The court held that no property right was involved.

Not only has this court repeatedly sanctioned the restraint of criminal proceedings in rate cases, but it has announced the general doctrine that a court of equity has the power to restrain criminal proceedings when necessary to the protection of property rights. In *Davis & Farnham Mfg. Co. v. Los Angeles*, 189 U. S., 207, 218, the court said:

> "It would seem that if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding (*Springhead Spinning Co. v. Riley*, L. R., 6 Eq., 558)."

The case of *Springhead Spinning Co. v. Riley*, L. R., 6 Eq., 551, was a case where the complainant sued to enjoin certain trades unionists from committing acts amounting to crimes and which tended to destroy or impair the value of

the company's property. The court in granting the injunction said:

> "The jurisdiction of this court is to protect property and it will interfere by injunction to stay any proceedings whether connected with crime or not, which go to the immediate, or tend to the ultimate, destruction of property, or to make it less valuable or comfortable for use or occupation."

In *Dobbins v. Los Angeles*, 195 U. S., 223, 241, the court said:

> "It is well settled that where property rights will be destroyed unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity" (*Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S., 207, 218, and cases therein cited)."

(f) The defendants to the Rate suit were appropriate and sufficient to give the court jurisdiction.

It is insisted that the Rate suit was a suit against the State in contravention of the Eleventh Amendment, because the Corporation Commission and the Attorney General were not "specially charged" with any duty respecting the enforcement of the passenger rate statute. We shall point out below in our more detailed discussion of the case of *Fitts v. McGhee* that opposing counsel misunderstand that case when they assume that a suit against State officers to prevent the execution of an unconstitutional statute is a suit against the State if its officers are not "specially charged" with the enforcement of the statute, but is not a suit against the State if such officers are "specially charged" with such enforcement.

For the present, however, we shall content ourselves by calling attention to the fact that in *Fitts v. McGhee* this court stated that the case of *Smyth v. Ames* was not a suit against the State, because the defendants "were officers of the State specially charged with the execution of a State enactment

alleged to be unconstitutional, but under the authority of which it was averred they were committing or about to commit some specific wrong or trespass to the injury of the plaintiff's right" (172 U. S., 529), and to the further fact that in *Smyth v. Ames* the Board of Transportation and the Attorney General (who were the State officers sued) had a decidedly more remote connection with the enforcement of the statute there in question than the Corporation Commission and Attorney General of North Carolina have with respect to the passenger-rate statute.

The Nebraska statute involved in *Smyth v. Ames* was an act of 1893 and was "self-executing." The statute prescribed the rates and the fines for failure to observe those rates. The statute imposed no duty whatever upon the Board of Transportation or upon the Attorney General, or upon any other officer or person with respect to the enforcement of the rates prescribed by the statute. The only connection which the Board of Transportation had with the enforcement of the rates prescribed by the statute was that, by a separate statute dealing with the board's general duties, it was provided that the board should have "general supervision of all railroads operated by steam in the State." The Attorney General was a member of the Board of Transportation. The only connection which the Attorney General as Attorney General had with the enforcement of the statute was by virtue of his general discretionary authority to appear for the State and his duty to consult with and advise the prosecuting attorneys in all matters pertaining to the duties of their office (Compiled Statutes of Nebraska, 1893, ch. 72, art. 8, sec. 17; ch. 83, art. 5, secs. 1*a* and 3). These provisions are printed in Appendix I in parallel columns with provisions of the Statutes of North Carolina.

Section 1036 of the Revisal of 1905 of North Carolina, which gives the Corporation Commission general control and supervision of railroad companies, imposes by itself upon that Commission fully as much of a "special charge"

with respect to the execution of the passenger rate statute as was imposed by the law of Nebraska upon the Board of Transportation with respect to the execution of the rate statute involved in *Smyth v. Ames.* In addition, section 1113 of the Revisal of 1905 makes it the duty of the Corporation Commission, "whenever in its judgment any corporation has violated any law," to give notice thereof, and if the violation shall continue it is provided that the Commission "shall forthwith present the facts to the Attorney General, who shall take such proceedings thereon as he may deem expedient." This is a specific duty with respect to every statute concerning railroad companies, which finds no counterpart whatever in the Nebraska statutes. Not only does the Attorney General of North Carolina by subsection 1 of the Revisal of 1905 have the same general authority as the representative of the State as characterized the Attorney General of Nebraska, but in addition he has the specific connection with every statute relating to railroad companies prescribed in section 1113 just referred to; and furthermore subsection 2 of section 5380 of the Revisal of 1905 provides that, at the request of the Corporation Commissioners, "he shall prosecute and defend all suits relating to matters connected with their" department. There is no corresponding provision in the laws of Nebraska. Thus the Attorney General of North Carolina, as Attorney General, is specifically identified with the enforcement of all statutes pertaining to railroad companies in a way which was wholly lacking in Nebraska.

If the Board of Transportation and the Attorney General in the Nebraska case were "specially charged" with the execution of the statute under consideration there, certainly the Corporation Commission and Attorney General of North Carolina are "specially charged" with the enforcement of the passenger rate statute. There is no feature of the present Rate suit which could be made the basis of a claim that the suit is a suit against the State that would not apply with stronger force to the case of *Smyth v. Ames.*

In addition to all this, the Corporation Commission of North Carolina was given express duties by the passenger rate statute itself with respect to the classification of the railroads, the exemption of certain railroads, the publication of the rates, and the determination where mileage books should be sold. Whether performance of those duties constituted or not a condition precedent to the going into effect of the rates (and they necessarily did as to the mileage books), they certainly were a distinct element connecting the Corporation Commission with the statute in question, and make still more clear the fact that the Commission had an important and substantial connection with the enforcement of that statute.

The point has been suggested that this suit as to the Corporation Commission and Attorney General is a suit against the State, because the statute may be executed without the interposition of those officers, or, in other words, is a "self-executing" statute. Any such distinction, if maintainable, would overthrow the decision of this court in every one of the rate cases.

In *Reagan v. Trust Company* the defendants were the railroad companies, the members of the Railroad Commission, and the Attorney General, and the court held that the suit was not against the State, and proceeded upon the theory that appropriate and sufficient defendants were before the court. But the rates prescribed by the Commission could have been enforced by any shipper who had not only his common-law rights, if the rates were valid, but in addition had the right under the statute to heavy statutory penalties recoverable in his own name.

In *Smyth v. Ames* the defendants were the railroad companies, the members of the Board of Transportation, and the Attorney General. The court held that the suit was not a suit against the State, and proceeded upon the theory that appropriate and sufficient defendants were before the court.

Yet every shipper could have enforced the statute, if valid, and could have recovered not only such damages as he might have sustained, but in addition the statutes gave him a reasonable attorney's fee. Moreover, every grand jury could have indicted the company for violating the statute, and every county attorney could have inaugurated prosecutions by information and could have conducted the prosecutions by indictments. It is impossible to suggest any self-executing feature pertaining to the passenger rate statute that did not exist with reference to the Nebraska statute.

In *Prout v. Starr* the same condition, of course, prevailed as in *Smyth v. Ames.*

There never has been a rate case where the rates complained of could not be enforced by some person who was not a defendant to the proceeding, and yet the court has never held that the absence of other defendants or the fact that persons not defendants could enforce the statutes would convert into a suit against the State a suit which would otherwise be within the jurisdiction of the court.

> *(g) The Rate suit being against appropriate and sufficient defendants, the court had jurisdiction of, and could and must deal with, the entire subject-matter of the controversy.*

Every rate case in this court has proceeded upon the theory just stated. As we have pointed out, there never has been a case where the statute, if valid, could not be enforced by persons who were not before the court, but the court has not, on that account, hesitated to proceed upon the idea that it had the right to deal, and ought to deal, with the entire subject-matter, and that the decision of the court would accomplish the purposes for which a court of equity takes jurisdiction of such a proceeding.

The only parties, other than the carrier, who are pecu-

niarily interested in the questions are the shippers and passengers.

> *Reagan v. Farmers' Loan and Trust Company*, 154 U. S., 362, 390; *Missouri, etc., Railway Company v. Missouri Railroad, etc., Commissioners*, 183 U. S., 53.

Although in many cases the Federal courts of the United States have dealt comprehensively with the question of the reasonableness of rates, the real parties in interest, to wit, the shippers or passengers, have not been before the court.

In *Reagan v. Trust Company* the defendants were the railroad companies, the members of the Railroad Commission, and the Attorney General. No shipper was a party, although the shippers were interested in the rates charged them by the railroad companies, and, in addition, were interested in the statutory penalties recoverable in their own names. In *Smyth v. Ames* the defendants were the railroad companies, the members of the Board of Transportation, and the Attorney General. No shipper was a party, although the shippers, in addition to being pecuniarily interested in the rates charged them, were also given by statute an attorney's fee in any action brought against the railroad company for charging more than the statutory rates. No county attorney was a party, although the county attorneys throughout the State had the right to enforce the statute by conducting proceedings to recover the penalties prescribed by the statute. In *Chicago, &c., Co. v. Tompkins*, 176 U. S., 167, the defendants were the Railroad Commission and the Attorney General. No shipper was a party, although interested in the rates. In *Cotting v. Kansas City Stock Yards Co.* the defendants were the Stock Yards Company and the Attorney General. None of the persons interested in the charges made by the Stock Yards Company was a party, and this court acted upon the assumption that it was not necessary for the Attorney General to be a party, directing a dismissal of the

suit as to him without prejudice, while directing the entry of a decree perpetually enjoining the Stock Yards Company from observing the statutory rates. The case of *Prout v. Starr*, 188 U. S., 537, was similar in all respects to *Smyth v. Ames.*

Yet in every one of the cases mentioned the court proceeded upon the assumption that it was in a position to control the whole subject-matter before it and to give the railroad company full relief.

In *Smyth v. Ames*, 169 U. S., 466, 517, the court said:

> "Under the principles which in the Federal system distinguish cases in law from those in equity, the Circuit Court of the United States, sitting in equity, *can make a comprehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that would inevitably arise under the statute.* The carrier is made liable not only to individual persons for every act, matter or thing prohibited by the statute, and for every omission to do any act, matter or thing required to be done, but to a fine of from one thousand to five thousand dollars for the first offense, from five thousand to ten thousand dollars for the second offense, from ten thousand to twenty thousand dollars for the third offense, and twenty-five thousand dollars for every subsequent offense. The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. *The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of*

> *equity is competent to meet such an emergency* and determine, once for all and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which the highway is maintained."

The case of *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U. S., 368, was a suit by the railway company to restrain defendants from enforcing ordinances reducing rates of fare. The court held that a court of equity had jurisdiction and said:

> "Of course, if the complainant obey these ordinances, no controversy can arise, but if in good faith it believe them to be invalid and hence not binding upon it, and without resorting to the courts for equitable relief, it refuses to obey them, the consequences may be not only embarrassing, but may lead to much unnecessary and expensive litigation. Continuous demands for the tickets mentioned in the ordinances at the reduced price therein provided for may be made by passengers while in the cars of complainant, and they may refuse to pay fare at the old rate, and may carry such refusal to the point of suffering removal from the cars on account of non-payment of fare. What amount of force would be necessary in the opinion of the various passengers to demonstrate that their going was not voluntary would of course give rise to disputes between them and the conductors, and would possibly, if not probably, lead to frequent breaches of the peace in the course of these attempts at removal. If not removed, then the passengers would either pay no fare or the complainant would have to accept the fare as provided in the ordinances of 1899, and that would be the same in fact as submitting to their enforcement.
>
> "The roads operated by complainant are also indebted to an extent of over eight million dollars, secured by mortgages upon the railways, their franchises, rights and privileges, together with the tolls and fares, earnings and profits arising therefrom,

and some of this indebtedness is soon to mature, and it is admitted that the bonds issued as evidence of such indebtedness and secured by its mortgages were so issued and sold to and purchased by the holders thereof in the full faith and belief that the various roads represented by the complainant had the right to charge the rates of fare fixed by the ordinances already mentioned, such belief being based upon the existence and terms of such ordinances.

"The ability of the complainant to renew or extend its mortgage indebtedness might depend upon belief in the validity of the contracts as to the rates of fare agreed upon before the attempted alteration thereof by the ordinance of 1899. The immediate enforcement of these later ordinances might result in such a decrease of income as to seriously imperil the solvency of the complainant. *An equitable action like this would certainly be more adequate and offer more effective and immediate relief than for the complainant to await the various actions at law to which it would otherwise be subjected by the defendants and the individuals demanding the reduced rates for transportation*" (pp. 379, 380).

The court pointed out that no penalties were fixed in the ordinances and quoted from *Smyth v. Ames* to the effect that the transactions of a single week would expose the company to a vast number of suits, to say nothing of the heavy penalties. The court held the same principle applied although no penalties were provided. The court further said:

"It is a matter of general public interest, as well as of vital importance to the complainant, that the question involved in this litigation should be determined at the earliest possible moment, and *once for all, and thus a multiplicity of suits and other complications prevented.*

"Taking all these facts into consideration, and bearing in mind that the answer does not set up any defense of the lack of jurisdiction of a court of equity over the subject-matter, and does not insist that there is an adequate and plain remedy at law

> (and no such objection has been taken at any time, and has not been insisted upon before us), we do not feel compelled, under the peculiar circumstances of the case, to ourselves take notice of it."

The case of *Cleveland v. Cleveland City Railway Co.*, 194 U. S., 517, was a similar case. Upon the subject of jurisdiction in equity the court said:

> "Respecting the contention that the case presented by the record was not within the jurisdiction of a court of equity, it suffices to say that, in view of the controversies, confusion, risks and multiplicity of suits which would necessarily have been occasioned by the resistance of the complainant to the enforcement of the ordinance, and in view of the public interests and the vast number of people to be affected, the case was one within the jurisdiction of a court of equity. This conclusion is, we think, besides inevitable, when it is borne in mind that the ordinance in question did not purport to reduce rates of fare upon the consolidated line, but was made operative alone upon a section of that line, and, therefore, necessarily, would have engendered the enforcement of two rates over the same line, leading to consequences dangerous to the public interest, peace and tranquillity, the extent of which it would be difficult in advance to perceive. And this, we think, brings the case directly within the principle by which jurisdiction in equity was maintained in Detroit *v.* Detroit Citizens' Street R'y Co., 184 U. S., 368" (p. 531).

None of the persons interested in the rates charged by the street railway company and entitled to assert a cause of action for any results flowing from the company's charging in excess of the legal rate was a party to either of the suits last referred to.

In all the cases the idea was clearly expressed, and in all similar cases which have arisen the idea has been neces-

sarily implied, that the court, by virtue of the proceeding before it, had jurisdiction of the subject-matter with which it was dealing and had authority to prevent all the confusion and controversies and multiplicity of civil actions and criminal prosecutions which would arise but for the assumption by a court of equity of jurisdiction over the entire subject-matter.

It necessarily follows, from the nature of the subject and from the way in which that subject has been considered and dealt with by this court, that the question whether a set of rates prescribed by or under legislative authority and alleged to violate the constitutional rights of the railroad company shall be enforced constitutes a single subject-matter which can be and ought to be heard and determined in a single equitable proceeding which will bind all parties. Upon any other assumption, all that has been done by the courts in this direction would have been futile. If the decrees granted by the courts in the cases which have arisen were binding only upon the persons who were defendants in those proceedings, and if every other officer or individual was left free to assert in the State courts any authority or right possessed by him under the statutes or at common law, the result would have been that every decree ever entered in any such case could have been nullified.

The underlying theory of the decisions of this court upon this subject has been that the subject-matter was one affecting the interests of a vast number of persons, all of whom could not possibly be brought into court, but that at the same time equitable principles and public policy require that the subject-matter shall be comprehensively and conclusively dealt with in a single proceeding, and that such proceeding may be maintained and the entire subject-matter completely disposed whenever there are appropriate defendants and the court is justified in assuming that the interests of both sides of the controversy are fairly represented.

In *Reagan v. Trust Co.* this court affirmed a decree in a suit brought by mortgage trustees restraining the railroad company itself from complying with the rates of the commission. In *Smyth v. Ames* this court affirmed a decree in a stockholders' suit restraining the railroad company itself from observing the rates fixed by statute. In *Cotting v. Kansas City Stockyards*, 183 U. S., 79, this court in a stockholders' suit directed the entry of a decree restraining the stockyards company itself from observing the rates fixed by statute. Manifestly this court would not have sanctioned such decree in any of these cases unless the court had been of opinion that the circuit court entering the decree had the power to protect the corporation in its observance of the decree and to prevent any interference by any person with the right of the corporation to comply with that decree. Such conclusion could not have been reached except upon the theory that the court had before it in each of those cases the whole subject-matter of the controversy, and that the shippers or customers who alone besides the corporation had a pecuniary interest in the rates affected were precluded by the decree which was rendered. The State did not have any pecuniary interest to be affected, and the court would not have permitted any procedure on the part of the State simply upon the basis of its governmental interest in enforcing its statutes which would tend to coerce the corporation into violating the decree of the Federal court. Such result could only have followed upon the idea that appropriate and sufficient defendants were before the court to enable the court to deal comprehensively and conclusively with the whole subject-matter. There can be no question whatever in the present Rate suit that appropriate defendants were before the lower court, defendants who had no ground for objecting to being sued and who sufficiently represented the persons who were pecuniarily interested in the result adversely to the railroad company. This is all the court has required in any case.

2. THE ORDER OF INJUNCTION WAS WITHIN THE POWER OF THE COURT.

This Rate suit was a proceeding to protect the property of the railroad company from unconstitutional invasion. The proceeding involved the consideration of the question whether the rates prescribed by statute afforded just compensation within the meaning of the Fourteenth Amendment for the use of the company's property, and further involved and called for whatever action the court might deem necessary to prevent the railway company from being compelled to devote its property to public use for less than a just compensation. It would have been utterly impossible for the court to exercise its jurisdiction without the power in a proper case to enter an interlocutory decree enjoining, until the further order of the court, the restriction of the carrier to the compensation prescribed by the statute complained of. The judicial power of the courts of the United States is complete within the limits defined by the Constitution and laws of the United States. When the protection of property comes within those limits that judicial power may take hold of the situation from that moment and may instantaneously afford whatever protection it may decide to be necessary. Any other theory would render the judicial power of the United States partial and incomplete. It would distinguish the Federal courts of equity from all other courts of equity to say that the Federal courts of equity in their discretion could not preserve an existing status pending final determination. The validity or invalidity of the North Carolina statute must depend in a case like this upon the determination of the Federal court. If the Federal court has the power upon final hearing to hold that the compensation fixed by statute is unjust, and that the carrier shall not be restricted thereto, it certainly has the power upon preliminary hearing to hold that there may be a temporary suspension of the plan to restrict the carrier to that compensation.

A great many instances are afforded by the cases already cited of interlocutory orders similar to the one involved in the present Rate suit. Such orders were made in *Reagan v. Trust Co., Smyth v. Ames, Cotting v. Kansas City Stockyards, Prout v. Starr, McNeill v. Southern Railway Company*, and *Mississippi Railroad Commission v. Illinois Central R. Co.*

In *Cotting v. Stockyards*, 183 U. S., 79, the circuit court decided that the rate statute was constitutional, and yet, believing the question to be doubtful, enjoined the enforcement of the statute pending an appeal to the Supreme Court. This procedure was mentioned with evident approval in the opinion of this court.

There has never been any suggestion in any decision of this court or any inferior Federal court of any lack of power upon the part of a circuit court, sitting as a court of equity, to grant an interlocutory injunction suspending the enforcement of a State enactment, provided the court had the power upon final hearing to render a decree perpetually restraining the enforcement of the State enactment. Any other view would simply mean a unique limitation upon the judicial power of the courts of the United States and also upon the enforcement of every constitutional limitation upon the powers of the States. It would mean that between the effective date of a State enactment and the time of final hearing thereon in a Circuit Court of the United States, there could be no protection whatever for any property rights unconstitutionally invaded by the enforcement of that enactment.

The suggestion that the enforcement of the State statute cannot be restrained by a Federal court until the Supreme Court of the United States shall have pronounced such statute unconstitutional would involve a still further limitation, greater in quantity, but not in quality, than the limitation upon the judicial power of the United States already discussed.

The Circuit Court having the power to make the interlocutory order which it made, there is no occasion in this proceeding for any discussion as to the propriety of that order. It may be pointed out, however, that the action of the Circuit Court was eminently just, because limiting the railway company to the statutory compensation would have meant an irreparable loss to the railway company in the event such compensation should be found to be unjust, whereas the suspension of the plan to limit the railway company to that compensation preserved the rights of all parties, because the court required the railway company to give to each passenger a coupon showing how much the passenger or the bearer of the coupon was entitled to recover in the event the statutory rate of compensation was held to be just, requiring the railway company to give a bond to pay the coupons in case the statute was upheld, and to report to the court from time to time as to the amounts collected in excess of the statutory compensation. Moreover, the order was not made until after full hearing upon affidavits of numerous witnesses of high standing to the effect that the statutes involved, if enforced, would result in the railroad company performing its entire interstate business upon a basis which would yield a return of less than half of one per cent. upon the value of the property as assessed for taxation. The members of the Corporation Commission, though presumably familiar with every fact which would justify the statutory rates and though actively resisting the motion, submitted no affidavits whatever other than their answer in opposition to the affidavits on behalf of complainant.

3. Wood's act, for which he was imprisoned, was in pursuance of the order and was an essential step in carrying out the judgment of the court.

The judgment of the court was that until the further order of the court the complainant could continue to charge its existing rates, and that the enforcement of the statute ought

to be suspended, and the interlocutory order was made to accomplish this decision. If the various agents of the company had refused to collect more than the statutory rate, they would have defeated the intention of the court; and if they had done this with knowledge of the injunction, they would have been guilty of contempt of court. Wood sold the ticket at the established rate and gave the purchaser the coupon required by the court's order. These were essential steps to carry out the court's decision, and if these steps had not been taken by Wood, the court's order with respect to that transaction would have been nullified. If the court had the power to make the order, it was absolutely necessary for Wood and all other agents of the company to observe the order, to the end that the jurisdiction of the court might be upheld and its decision carried into effect.

4. WOOD'S RELEASE UPON WRIT OF HABEAS CORPUS WAS A LAWFUL AND ESSENTIAL STEP IN CARRYING OUT THE DECISION OF THE COURT AND ENFORCING THE JURISDICTION OF THE COURT.

Section 753 of the Revised Statutes of the United States clearly sanctions the use of the writ of *habeas corpus* in the present case, because Wood was in custody for an act done in pursuance of an order of a court of the United States. That section reads as follows:

> "The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted

> under any legal right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

The right of the court to protect its order and process by the issue of the writ is unquestioned.

The expediency of the action of the court is manifest.

The court had decided that the passenger-rate statute ought not to be enforced pending final determination of the question. This decision would have been absolutely nullified if the agents of the railway company could have been imprisoned by the State authorities. This is not a mere surmise as to possible consequences, but is simply a statement of what was imminent at the time of Wood's arrest and subsequent discharge. Upon this point the court below in its opinion said:

> "Notwithstanding the United States Circuit Court had thus taken jurisdiction of the whole matter and was proceeding in an orderly way with its consideration, the evidence shows that the Governor of North Carolina has issued an address to the judges of the superior courts of the State, questioning the authority of the court to make the order referred to, and asking them to see that indictments against the agents and employees of the railroads and its officials be sent before the grand jury, in order that the State may undertake the prosecutions which are enjoined in my order, and stating that, as chief executive of the State, he stands ready to aid them in enforcing the law. In accordance with this policy, a number of indictments have been found and prosecutions begun in defiance of the order of injunction issued by the United States Circuit Court. If these prosecutions are permitted and continued, the result will be to nullify the injunction which was granted by the Circuit Court, and to practically defeat its jurisdic-

> tion. Not only are the rights of litigants involved, but the dignity and authority of the Circuit Court of the United States as well. These prosecutions and arrests, taking place in widely separated portions of the State, present serious difficulties in the matter, and this court is confronted with open and avowed opposition by the powers of the State. Obstacles are being thrown in the way of inquiry by this court on writ of *habeas corpus* into the legality of arrests, and this seems to be the deliberate policy of those representing the State."

Not only was the supremacy of the judicial power of the United States menaced by the action of which the arrest and conviction of Wood was a part, but the whole interstate commerce of the Southern Railway Company and its transportation of the United States mails were vitally involved.

The court below in its opinion said:

> "If the criminal prosecutions against the agents, conductors, and employés are permitted to continue, the managers of the railroads cannot successfully operate their trains, carry the mails, or continue their usefulness as common carriers doing an interstate business."

It is difficult to conceive of a more urgent case for the use of the writ of *habeas corpus* than existed in the present proceeding.

Illustrations of the discharge of persons in custody (under State authority) upon writs of *habeas corpus* by Federal courts to effectuate their jurisdiction are afforded by the cases of:

U. S. *v.* Spink, 19 Fed., 631.
In re Houston, 94 Fed., 119.
Anderson *v.* Elliott, 101 Fed., 609.
State *v.* Laing, 133 Fed., 887.

5. THE CASE OF FITTS V. MCGHEE IS NOT OPPOSED TO ANY OF THE FOREGOING PROPOSITIONS.

It is not belived that the jurisdiction of the Circuit Court of the United States would have been questioned but for a misconception upon the part of opposing counsel and their associates with respect to the effect of this court's decision in *Fitts v. McGhee*. It is quite evident from the terms of the freight-rate statute and of the passenger-rate statute, and from the subsequent happenings in North Carolina, that it was generally believed by the members of the legislature of that State that the case of *Fitts v. McGhee* afforded a method of rendering State rate statutes "injunction-proof," and of coercing railroad companies, through the imposition of heavy penalties, into observing rates, whether unconstitutional or not.

Therefore a careful examination of the case of *Fitts v. McGhee*, 172 U. S., 516, seems advisable. In this case an Alabama statute of February 9, 1895 (Alabama Laws 1894-1895, p. 375), prescribing rates of toll for a bridge at Florence, Alabama, was attacked, upon the ground that the statute impaired the obligation of a contract between the State and the bridge company, and that the statute would operate to deprive the bridge company of its property without due process of law. The statute imposed for violation thereof penalties upon the bridge company recoverable only by the indivaduals aggrieved. *This was the only method provided in that statute or in any other law for the enforcement or administration of that statute.* No public officer was charged with any duty of supervision, administration, prosecution, or enforcement under any law with respect to the statute in question.

The whole tenor of the act showed that, as in many other instances, the State had merely prescribed a rule of action for the benefit of individual members of a part of the public and had left the enforcement of that rule to those individuals.

The statute evinced no suggestion of any policy to identify the State officers with the enforcement of the regulation. This situation was all the more natural in view of the purely local character of the regulation, affecting only traffic of a purely local or neighborhood character over a single bridge.

Under these circumstances no State officer was in the attitude of proposing to enforce, or was connected with the enforcement of, the statute against the bridge company. With no color of plausibility could the claim be made, which was properly made in *Pennoyer v. McConnaughy,* 140 U. S., 1; *Reagan v. Trust Company,* and *Smyth v. Ames,* that particular State officers were about to enforce an invalid statute, and therefore those officers should be made defendants to a bill in equity and enjoined from taking such steps to the injury of the complainant. In the Alabama case there was a complete absence of any personal connection between any State officer and the bridge company with respect to the statute in question.

The court emphasized this condition by calling attention to *Reagan v. Trust Co.* and to *Smyth v. Ames* among other cases and saying:

> "Upon examination it will be found that the defendants in each of those cases were officers of the State specially charged with the execution of a State enactment alleged to be unconstitutional, but under the authority of which it was averred *they were committing, or were about to commit, some specific wrong or trespass to the injury of the plaintiff's rights*" (p. 529).

The vital distinction, therefore, between *Reagan v. Trust Co.* and *Smyth v. Ames* on the one hand and *Fitts v. McGhee* on the other hand is the fact that in the two former cases the State officers were "about to commit" the specific wrong of instituting judicial proceedings to enforce an unconstitutional statute, and therefore had such a personal connection with the enforcement of that wrongful statute as to make them the

proper subjects of injunction, whereas in the latter case it could not be claimed by any plausible pretense that any State officers were committing or were about to commit any such steps, and there was entirely lacking that personal connection on their part with the enforcement of the statute which would justify their being personally sued.

Under these circumstances the receivers operating the bridge elected to test the constitutionality of the statute in a proceeding against the State in its governmental capacity as a convenient representative of the people affected by the statute. Accordingly the suit was brought against the State of Alabama *eo nomine* and its Governor and Attorney General, and was confessedly a suit against the State "to test the constitutionality of the statute." Subsequently the suit was dismissed as to the State, but the character of the allegations against the Governor and Attorney General was not substantially changed, and the suit remained, what it was at the outset, a suit against the State.

In the case of *In re Ayers,* 123 U. S., 443, the court decided that the suit could not be regarded as a suit against the defendant officers, because the statute they were about to enforce was constitutional, and hence their action in enforcing that statute could not be regarded as a personal wrong to the complainants. In *Fitts v. McGhee* the court decided that the suit could not be regarded as a suit against the Governor and Attorney General personally because they were not "about to enforce" the statute at all. In each of the cases the necessary result was that, as the suit could not be regarded as a suit against the officers personally, therefore it must be regarded as brought against them in their representative capacity.

The court, holding that the case of *Fitts v. McGhee* could not be regarded as a suit against the Governor and Attorney General in their personal capacity, but must be regarded as a suit against the State itself, summed up the whole case in the following passage:

> "If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former as the executive of the State was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. *If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespass or wrong*" (p. 530).

We repeat that the vital point was that the Governor and Attorney General were not committing or attempting to commit the wrong of instituting judicial proceedings to enforce an unconstitutional statute, and therefore they could not be "individually proceeded against" to prevent such wrong.

It has been urged at times that this court by its decision in *Fitts v. McGhee* established the doctrine that a suit cannot be maintained to enjoin State officers from enforcing an unconstitutional statute unless the duty to enforce that statute is expressly imposed in the very statute which is claimed to be unconstitutional. Clearly no such construction can properly be given to the court's opinion. The court mentioned the fact that the Governor and Attorney General were not "specially charged" with the enforcement of the statute, but clearly this was done to emphasize the fact that those officers had no such personal connection with the enforcement of the statute as to render it proper to make them personal defendants. The fact that the officers were not specially charged

with the enforcement of the statute was mere evidence proving, or rather corroborating, the view that they were not about to commit the wrong of enforcing the statute complained of. The court's language did not express the idea, and cannot rationally be construed as implying the idea, that the wrong done to an individual by the enforcement of an unconstitutional statute may be prevented by a suit against the State officer enforcing the same where the duty to enforce the statute is expressly imposed by that very statute, but may not be prevented where the duty is imposed by some other statute, or where the wrongful act of enforcement is committed simply by virtue of some general authority without any specific duty in regard thereto being in existence.

Upon this proposition we again remind the court of the reason mentioned on page 19 of this brief, which underlies the doctrine that a suit against a State officer to restrain the execution of an unconstitutional statute is not a suit against the State. The idea is that a State officer in the execution of an unconstitutional statute is stripped of his authority as an officer and has no more justification than an individual for the course which is complained of.

If a bill in equity brought by a complainant against a defendant who is not a State officer alleges that the defendant is about to commit an irreparable injury to the complainant's property, a court of equity will enjoin the commission of such a wrong. The court is in no way concerned with the question whether the defendant is "specially charged" with any duty to do the wrongful act. It is in no sense a question of duty. It is simply a question of whether the probability of the irreparable injury is so strong as to justify the intervention of a court of equity.

If this defendant happens to be a State officer and if the wrong to be done happens to be the execution of an unconstitutional, and therefore void, statute, the situation is not changed. It is immaterial to the court of equity whether the officer is "specially charged" with the duty of enforcing

the unconstitutional statute or not. Indeed, in no proper sense can any officer be charged with any duty to enforce any unconstitutional statute. The question for the court is whether the officer has such a connection in fact with the enforcement of the statute as to justify a suit against him personally. If the officer claims that the statute is constitutional and there is any duty, special or general, upon him to enforce statutes of that character, such a condition furnishes strong presumptive evidence that the officer is about to enforce the statute, and hence tends to remove all question as to the personal connection of the officer sued with the enforcement of the statute in question, and it is for this reason alone that the question whether the officer is charged with the duty of enforcing the statute may be material. Herein, as above pointed out, is the distinction between *Fitts v. McGhee* and the present Rate suit. The Governor and Attorney General of Alabama had no actual connection with the enforcement of the bridge statute, and there was no law of the State of Alabama which imposed upon either of them any duty which could give rise to any presumption that in the carrying out of that duty they would take any steps to enforce that statute or to become personally connected in any way whatever with the subject.

In none of the long line of cases, where the doctrine of *Osborn v. Bank of the United States,* has been applied could a State officer sued have defended successfully upon the assertion, "I admit that I am about to enforce an unconstitutional statute to the destruction of the rights of the plaintiff, but I cannot be restrained from doing so because I am not specially charged with the enforcement of that statute." There can be no such qualification of the settled doctrine that "an officer of a State may be enjoined from executing a statute of a State which is in conflict with the Constitution of the United States when such execution would violate and destroy the rights and privileges of the complainant." Otherwise the State legislature, to evade successfully the Constitu-

tion of the United States, needs only to embody its unconstitutional legislation in one statute and to embody the duty of enforcement in a separate statute, or to refrain from establishing any express duty of enforcement, leaving such enforcement to the action of the State officers in the exercise of their general powers.

Moreover, if such irrational qualification of the established doctrine on this subject be adopted, it then follows that the cases of *Smyth v. Ames* and *Prout v. Starr* were incorrectly decided, because the statute complained of in those cases imposed no duty with respect to its enforcement upon either the Board of Transportation or the Attorney General, and the only duty in regard thereto imposed upon the Board of Transportation was by virtue of the most general language in a much earlier statute merely giving the board "general supervision" over the railroads of the State, and the only duty in regard thereto imposed upon the Attorney General was by virtue of general statutory provisions giving him discretionary authority to appear for the State and making it his duty to consult with and advise the prosecuting attorneys in matters pertaining to the duties of their office.

Any assumption that the distinction between *Reagan v. Trust Company, Smyth v. Ames*, and *Prout v. Starr*, on the one hand, and *Fitts v. McGhee*, on the other, lies in the fact that the officers in the latter case could not be enjoined, because the only way in which they could enforce the statute would be by the institution of judicial proceedings instead of by some specific act which could be regarded as a tort, is wholly unfounded, because the only possible wrong which could have been committed by the officers sued in *Reagan v. Trust Company, Smyth v. Ames*, or *Prout v. Starr* was the institution and conduct of legal proceedings. The language of the Court in *Fitts v. McGhee*, as well as its language in *In re Ayers*, upon the proposition that controlling the institution of judicial proceedings controls the action of the State itself, must be read in the light of the fact that in each of these cases the State was regarded, and properly regarded, as

the real party sued, and it was simply pointed out that, being the real party sued, the issue could not be evaded by saying the process would operate merely upon State officers and not upon the State itself.

Any assumption that the decision in the case of *Fitts v. McGhee* rested upon the idea that the suit must necessarily be regarded as a suit against the State, simply because it was only in the capacity of State officers that the officers sued could injuriously affect the complainant's rights, is likewise wholly at variance with practically every case where a suit against a State officer has been sustained, because in every such case the wrongful acts complained of could be committed by the officer only as the officer of the State. This is strikingly true of *Pennoyer v. McConnaughy, Reagan v. Trust Company, Smyth v. Ames,* and *Prout v. Starr.* The theory underlying all these cases is that, notwithstanding the fact that the action is official, yet the official position does not protect the officer from being personally sued and enjoined where the action he is about to take is for the enforcement of an unconstitutional statute which will so injure the rights of the plaintiff as to entitle him to relief in equity.

We repeat that the vital distinction between the cases of *Reagan v. Trust Company, Smyth v. Ames,* and *Prout v. Starr,* on the one hand, and *Fitts v. McGhee,* on the other, was that in the former three cases the officers sued were "about to commit" the specific wrong of instituting judicial proceedings to enforce an unconstitutional statute, while in *Fitts v. McGhee* the Governor and Attorney General could not by any plausible pretense be regarded as being "about to commit" any such wrong, and therefore, the suit could not be viewed as a suit to prevent them personally from taking such official action to the injury of the complainants.

A distinct branch of the decision in *Fitts v. McGhee* was the decision that the prosecution of indictments in the State courts could not be enjoined under the peculiar circumstances

presented in that case. Those circumstances were that after the suit had been brought indictments were found against one of the bridge tollmen whereby he was charged with the violation, *not of the statute complained of as unconstitutional,* but of a section of the Alabama Code which imposed a penalty for charging more than a reasonable rate, such rate to be fixed by a jury, *and the constitutionality of which section of the Code was not questioned in any way.*

This section 4151 of the Criminal Code of Alabama read as follows:

> "Any person who, being or acting as an officer, agent, servant or employee of any turnpike company, macadamized road company or other incorporated road or bridge company, takes, receives or demands any greater charge or toll for travel or passage over such road or bridge than is authorized by the charter of such company, or if the charter does not specify the amount of toll to be charged or taken, fixes, prescribes, takes, receives or demands any unreasonable charge or toll, to be determined by the jury, must on conviction be fined not more than one hundred dollars."

This section of the Code had not been attacked in the suit and was in no way involved therein, so that the indictments did not in any way relate to the subject-matter covered by the suit. After the State court had acquired complete jurisdiction of this new and distinct subject-matter arising under the indictments for the violation of the Code, the bill was amended so as to show these facts, the prosecuting solicitor was made a party defendant, and an injunction was obtained restraining him from proceeding with these indictments. Under such circumstances this court held that the injunction against the prosecuting attorney was an injunction against criminal proceedings in a State court contrary to section 720 of the Revised Statutes of the United States. This decision was entirely consistent with the decisions in *Reagan v. Trust Company, Smyth v. Ames,* and *Prout v.*

Starr, that in a suit in equity against appropriate defendants the court, to protect the subject-matter thereby brought within its jurisdiction, may enjoin the institution or conduct of all proceedings, either civil or criminal, which might otherwise be brought *thereafter* in the State courts.

The discussion in *Fitts v. McGhee* of the injunction, as restraining the prosecuting solicitor from prosecuting the indictments, was based upon the doctrine stated by the court in *In re Sawyer,* 124 U. S., 200 (which was a case not involving property rights), that in general a court of equity is without jurisdiction to enjoin the institution or prosecution of criminal proceedings because the jurisdiction of a court of equity is limited to the protection of property rights.

This court, however, has clearly recognized that where property rights are involved a court of equity may enjoin the institution and prosecution of criminal proceedings.

In *Davis & Farnum Mfg. Co. v. Los Angeles,* 189 U. S., 207, 218, the court said:

> "It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding."

In Dobbins *v.* Los Angeles, 195 U. S., 223, 241, the court said:

> "It is well settled that where property rights will be destroyed unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity. Davis & Farnum Mfg. Co., *vs.* Los Angeles, 189 U. S. 207, 218, and cases therein cited."

In *Fitts v. McGhee* the court also referred to the fact that two tollgate-keepers who had been indicted for violation of section 4151 of the Criminal Code had been released upon

writs of *habeas corpus*, and that thereby the court had interfered with their trial in the State court. This court held that this action was erroneous, because "the Circuit Court, sitting in equity, was without jurisdiction to prohibit the institution or prosecution of those criminal proceedings in the State court." Of course, therefore, the decision on this point has no bearing in a case where the order of injunction is within the jurisdiction of the court.

6. THE CONTENTIONS OF OPPOSING COUNSEL, IF ADOPTED, WOULD DESTROY THE JURISDICTION OF THE FEDERAL COURTS UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES, AND DESTROY THE OPERATION OF THE FOURTEENTH AMENDMENT.

In order adequately to appreciate the effect of the contentions of opposing counsel, it is proper to set forth with some detail the expressions of this court as to the jurisdiction of the courts of the United States with respect to controversies of this character.

(*a*) *The question whether a legislative enactment fixing rates affords just compensation is a question for judicial determination.*

In *Chicago, etc., Company v. Minnesota*, 134 U. S., 418, 458, the court said:

> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and

effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital the company is deprived of the equal protection of the laws."

In *Reagan v. Farmers' Loan & Trust Company*, 154 U. S., 362, 397, 399, the court said:

"It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation" * * * (p. 397).

"These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates

to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property" (p. 399).

In *Smyth v. Ames*, 169 U. S., 466, 526, 527, the court said:

"While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry" (526).

"But despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a State enactment is in harmony with that law simply because the legislature of the State has declared such to be the case; for that would make the State legislature the final judge of the validity of its enactment, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding (Art. VI). The idea that any legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary

distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land" (527).

In *Chicago, Milwaukee, etc., R'y, v. Tompkins,* 176 U. S., 167, 172, the court said:

> "Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a State legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. It has often been said that this is a government of laws and not of men; and by this court, in Yick Wo *v.* Hopkins, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.'
>
> "When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, State or nation, without any right of appeal to the courts, is one which can not for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution."

(*b*) *This question is essentially civil in its character and has always been so treated.*

The only parties, other than the carrier, who are pecuniarily interested in the questions are the shippers and passengers.

In *Reagan v. Farmers' Loan and Trust Company,* 154 U. S., 362, 390, the court, dealing with the question as to what parties were substantially interested in the controversy as to the validity of the rates attacked, said:

> "Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property" (page 390).

In *Missouri, etc., Railway Company v. Missouri Railroad, etc., Commissioners,* 183 U. S., 53, the Railroad Commission of Missouri brought suit against the railway company in a State court to enforce an order of the Commission requiring the discontinuance of certain rates held to be excessive. The railway company, on the ground of diverse citizenship, sought to remove the case to the Circuit Court of the United States. Such removal was denied by the State court upon the ground that the real party plaintiff was the State of Missouri, and therefore a removal was not authorized because the State was not a citizen within the meaning of the "removal acts." The case was brought to this court upon writ of error, and the judgment of the State court was reversed upon the ground that the removal should have been allowed because the State was not the real party plaintiff. The court said:

> "It is not an action to recover any money for the State. Its results will not enure to the benefit of the

> State as a State in any degree. It is a suit to compel compliance with an order of the Railroad Commissioners in respect to rates and charges. The parties interested are the railway company on the one hand and they who use the bridge on the other; the one interested to have the charges maintained as they have been, the others to have them reduced in compliance with the order of the Commissioners. They are the real parties in interest, and in respect to whom the decrees will effectively operate" (p. 59).

In *Chicago, etc., Co. v. Tompkins*, 176 U. S., 167, 173, the court, in pointing out the right of the company to a judicial consideration of this subject, used this illustration:

> "It is within the competency of the legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision; but if after determining that certain property shall be taken for public uses the legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals. The same principle applies when vested rights of property are disturbed by a legislative enactment in respect to rates."

Clearly a controversy involving exclusively the question of just compensation for property devoted to a public use must be essentially a controversy of a civil nature, and if it be presented in the form of a civil controversy and the jurisdictional amount be sufficient the subject comes within the judicial power of the United States as defined by the Constitution and laws of the United States.

(c) A suit in equity is a proper form of suit for the determination of this question.

The propriety of a suit in equity for this purpose was pointed out by Mr. Justice Miller in his concurring opinion in *Chicago, etc., Railway Company v. Minnesota,* 134 U. S., 418, as follows:

> "6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.
>
> "7. That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method" (p. 460).

The jurisdiction of a court of equity with respect to this question has been recognized in a great many cases, and the practical necessity for resort to such jurisdiction has been emphatically pointed out in the following, among other, cases: *Smyth v. Ames,* 169 U. S., 466, 517; *Detroit v. Detroit Citizens' Street Railway Company,* 184 U. S., 368, and *Cleveland v. Cleveland Street Railway Company,* 194 U. S., 517.

In addition to the complex character of the questions involved with which the machinery of a court of law cannot adequately deal and in addition to the multiplicity of ac-

tions, prosecutions, and controversies which can only be avoided by a comprehensive proceeding in equity a further important reason for resort to a court of equity in such cases is the practical and indeed legal necessity for uniformity in the rates of railroad companies. One of the most important principles of public policy underlying the regulation of railroad rates is the principle that the same rates shall be charged to all persons under similar circumstances. If the validity of a statutory schedule of rates is to be questioned, the only method in which that question can be tested so as to conserve this important principle of public policy is to have the question heard and determined in some proceeding which will be binding upon all parties interested in the rates and which will insure uniformity of action with respect to all persons.

(d) A Circuit Court of the United States sitting in equity is an appropriate tribunal to determine this question.

In *Reagan v. Farmers' Loan and Trust Company*, 154 U. S., 362, 391, the court said:

> "Nor can it be said in such a case that relief is obtainable only in the courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defense. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal courts" (391).

In *Smyth v. Ames*, 169 U. S., 466, 516, the courts, responding to the suggestion that the remedy in the State courts prescribed by the Nebraska act was exclusive, said:

> "We cannot accept this view of the equity jurisdiction of the circuit courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a State court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the circuit courts of the United States (citing authorities). But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction" (p. 516).

The passenger-rate statute provides that any railroad company violating any provision of the act shall be liable to a penalty of $500 for each violation, payable to the person aggrieved by such violation and recoverable in an action to be instituted in the name of said person in any court of this State having competent jurisdiction thereof.

Section 2 of the freight-rate statute provides that "any railroad company doing business in the State of North Carolina which shall make charges for shipments of freight in violation of the provisions of the act shall be guilty of a misdemeanor, and such corporation shall upon conviction be fined not less than $100."

The operation upon the railroad company of the penal provisions of these statutes would make possible the imposition of fines which in a very short time would far exceed the total value of the railway company's property in the State of North Carolina, and in a short time would exceed the total value of the railway company's property in all the States in which its lines are located. The expense incident to defending all these prosecutions would itself soon equal the value of the property of the company. Under such circumstances it is clear that the power of the company to perform its duty as an interstate carrier and as a carrier of the United States mails would be greatly imperiled if, without resorting to a court of equity for protection, the company, believing the statutes to be unconstitutional, should decline to obey them. The result would be that the company's ability to continue its service to the Government of the United States and in interstate transportation would depend upon the chance whether the statutes would eventually be declared to be unconstitutional, or, if found constitutional, would depend upon the generosity or conservatism of the individual citizens of North Carolina and the prosecuting officers and executive of that State.

The passenger-rate statute also provides that "any agent, servant, or employee of any railroad company violating this act shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court." The freight-rate statute provides that "any officer or agent of a railroad company who shall make charges for shipments of freight in violation of the provisions of the act shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court."

Therefore, if the railroad company had no opporunity to go into a court of equity to obtain protection, and, believing these statutes to be unconstitutional, were to decline to observe them, the result would be a partial paralysis, and perhaps a complete paralysis, of the whole transportation

service of the railroad company, including its transportation of the United States mails and its transportation of interstate passengers and property. When we recall the emphatic position taken by this court in the case of *In re Debs*, 158 U. S., 564, to the effect that the powers of the circuit courts of the United States, as courts of equity, may be exercised to prevent any obstruction of the United States mails or of the channels of interstate commerce, it seems peculiarly appropriate that the circuit courts of the United States should be appealed to in cases like this, to the end that there may be an orderly determination of the rights of the persons interested in the railroad companies affected by the statute.

(e) Any device of a State statute which would prevent the determination of such a controversy by the Federal courts of equity would be inconsistent with the supremacy of the judicial power of the United States.

It being established that a suit against officers of a State to prevent the execution of an unconstitutional statute is not a suit against the State, and that in a proper case for the protection of property rights a court of equity can enjoin criminal proceedings, we submit that this case has only two remaining aspects: First, shall the judicial power of the United States be supreme? and, second, Is there any adequate remedy for invasions of the property rights of persons by prosecutions contrary to the Constitution of the United States?

The second paragraph of Article VI of the Constitution of the United States reads as follows:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Section 1 of Article III of the Constitution of the United States provides in part:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

Section 2 of Article III of the Constitution of the United States provides, among other things, that—

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States," * * *

Section 608, Revised Statutes, establishes circuit courts of the United States.

Section 1, ch. 866, of 25 U. S. Statutes at Large, p. 434, provides:

> "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States," etc.

We have here a controversy of the very greatest importance to property rights, a controversy which is essentially civil in character, a controversy which demands the exercise of the jurisdiction of a court of equity, a controversy which it is especially important shall be passed upon by the courts of the United States, on account of the intimate connection between the enforcement of statutes of this character and the interstate transportation service of this country, and also the carriage of the United States mails. The question is whether State legislatures may take away a part of the judicial power which the Constitution and laws of the United States have conferred upon the circuit courts of the United States. According to the contentions of opposing counsel,

the judicial power of the United States is subject to encroachment of this character whenever State legislatures determine what shall be the compensation for property devoted to a public use and provide for the enforcement of their determination by criminal proceedings, omitting to make it the exclusive or specific duty of some particular officer of the State to see to the enforcement of such legislative provisions. We deny that the judicial power of the United States is thus subject to repeal *pro tanto* by State legislatures.

> *(f) Such impairment of the judicial power of the United States would modify the effect of, and in cases like this would practically destroy, the Federal limitations upon the powers of the States.*

Not only do the contentions of opposing counsel result in the proposition that State legislatures have the power to repeal *pro tanto* the judicial power of the United States, but in the further proposition that the State legislatures have a practical and substantial power to repeal all other provisions of the Constitution of the United States which amount to a limitation upon the powers of the States.

The Federal judiciary was created to enforce the Constitution and laws of the United States. It is the judgment of Congress that to secure the adequate enforcement of the Constitution and laws of the United States, it is advisable that provision be made for the trial in the first instance in the Federal courts of suits of a civil nature, where the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars, and arising under the Constitution or laws of the United States.

To the extent that the Federal legislation designed to effectuate this view is defeated by State legislation, it follows that State legislation can defeat the adequate enforcement of the Constitution and laws of the United States, and in many cases, of which the present Rate suit is a striking example, such State legislation could effectually destroy the

rights guaranteed by the Constitution of the United States.

As has been so forcibly pointed out by this court in *Smyth v. Ames* and in other cases, there can be no adequate protection of constitutional rights in cases like this except in courts of equity. If State legislatures can devise methods by which the judicial power of the United States courts as courts of equity can be ousted and they can be prevented from determining these questions which are essentially civil in their nature, the result is that the property affected is without any adequate remedy anywhere. The multiplicity of suits and prosecutions would of itself deter the corporation from asserting its rights under the Constitution of the United States. A corporation whose business it is to serve the public by operating a railroad cannot, in order to protect a right existing by virtue of the Constitution of the United States, litigate separately the same question with every individual in the State who may by the ingenuity of State legislation be given a separate cause of action with respect to the subject of controversy. Moreover, the penalties imposed constitute an insurmountable barrier to any assertion of constitutional rights if the corporation is excluded from a comprehensive proceeding in equity.

Again, the imposition of fines and imprisonment upon the agents of the corporation is calculated so to terrorize and demoralize those agents as to coerce them either into complying with unconstitutional statutes or into leaving the service of the company and paralyzing its transportation service.

In conclusion, it seems appropriate to refer to the language of this court by Chief Justice Marshall in *Osborn v. United States Bank*, 9 Wheat., 738. The court, after stating the argument of appellants that the suit was against the State of Ohio, and therefore the Circuit Court could not exercise jurisdiction, said:

> "Before we try this question by the Constitution, it may not be time misapplied, if we pause for a moment,

and reflect on the relative situation of the Union with its members, should the objection prevail.

"A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts, that the agents of a State, alleging the authority of a law void in itself, because repugnant to the Constitution, may arrest the execution of any law in the United States. It maintains, that if a State shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous penalties, from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties, and the person thus obstructed in the performance of his duty may indeed resort to his action for damages, after the infliction of the injury, but cannot avail himself of the preventive justice of the nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws, otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation.

"These are said to be extreme cases; but the case at bar, had it been put by way of illustration in argument, might have been termed an extreme case; and, if a penalty on a revenue officer, for performing his duty, be more obviously wrong than a penalty on the

bank, it is a difference in degree, not in principle. Public sentiment would be more shocked by the infliction of a penalty on a public officer for the performance of his duty than by the infliction of this penalty on a bank, which, while carrying on the fiscal operations of the government, is also transacting its own business; but, in both cases, the officer levying the penalty acts under a void authority, and the power to restrain him is denied as positively in the one as in the other.

"The distinction between any extreme case and that which has actually occurred, if, indeed, any difference of principle can be supposed to exist between them, disappears, when considering the question of jurisdiction; for, if the courts of the United States cannot rightfully protect the agents who execute every law authorized by the Constitution, from the direct action of State agents in the collection of penalties, they cannot rightfully protect those who execute any law.

"The question, then, is, whether the Constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular State to resist the execution of those laws" (pp. 846-849).

If it be held that circuit courts of the United States have no jurisdiction to restrain the enforcement of statutes like the passenger-rate statute, when in conflict with the Constitution of the United States, then the inability of Ohio to tax the Bank of the United States was merely due to lack of ingenuity on the part of the Ohio legislature. The legislature instead of providing for the seizure of the money of the bank should have provided for a vast number of judicial proceedings, for enormous penalties, and for criminal prosecutions against all the employees of the bank. The bank would have been unable to restrain the enforcement of the statute, and no doubt, to avoid the risk of the penalties, the expense of the litigations, the demoralization of its entire force through fear of imprisonment, the bank would have paid the tax or have withdrawn from business in the State.

II.

ORDER OF DISCHARGE PROPER BECAUSE WOOD WAS IN CUSTODY IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

Wood had charged more than 2¼ cents per mile for a passenger ticket, and therefore was held by the police justice to have violated section 1 of the passenger-rate statute, and hence to be guilty of a misdemeanor. In pursuance of section 4 of the statute, the police justice sentenced Wood to the chain gang for thirty days. Hence Wood was in the custody of the sheriff of Buncombe County because of the imposition upon him of the penalty prescribed by section 4 of the passenger-rate statute.

We contend that if the proceeding in equity in the Federal court was unavailing to prevent the imposition of the penalty, then the penal provisions of the statute were in conflict with the Constitution of the United States, and that the circumstances were so extraordinary as to justify Wood's release by a writ of *habeas corpus*.

1. Unless the Federal court had jurisdiction of the rate suit and could prevent the imposition of penalties for acts under the order of the court, then the penal provisions of the passenger-rate statute are contrary to the Constitution of the United States.

(a) *The statute was simply a method of fixing reasonable compensation for a legitimate use of property.*

It must constantly be borne in mind that the passenger-rate statute was not a statute to prohibit a use of property deemed by the legislature to be injurious to the public wel-

fare. The statute was simply a convenient method for fixing reasonable compensation for a legitimate and necessary use of property devoted to a quasi-public service. A remedy in the courts existed at common law for the exaction of any unreasonable compensation for such service; but, such remedy being inconvenient and inadequate, the statute was simply an additional step in securing in a convenient way the establishment of a reasonable and uniform rate of compensation for a legitimate use of property. The subject with which the statute dealt was essentially a subject of a civil character and was in no sense a subject of a criminal character. The mere fact that the legislature chose to provide for the enforcement of the statute by criminal proceedings did not change the essential nature of the subject-matter of the regulation.

> (*b*) *The question whether the compensation so fixed is reasonable is a question for judicial determination.*

While at this day this proposition needs no citation of authority, yet it seems appropriate to set forth in this connection the language of this court:

In *Chicago, etc., Company v. Minnesota,* 134 U. S., 418, 458, the court said:

> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination.

In *Reagan v. Farmers' Loan & Trust Company,* 154 U. S., 362, 397, 399, the court said:

> "It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is

a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practicable destruction to rights of property, and, if found so to be, to restrain its operation" * * * (page 397).

"These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property" (p. 399).

In *Smyth v. Ames*, 169 U. S., 466, 526, the court said:

"While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and, therefore, without due process of law, cannot be so conclusively determined by the

> legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry" (526).

In *Chicago, Milwaukee, etc., Ry. v. Tompkins*, 176 U. S., 167, 172, the court said:

> "When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state or nation, without any right of appeal to the courts, is one which cannot for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution."

> (c) *If the Rate suit was not an appropriate and effective method of obtaining this judicial determination, then no method whatever was possible except to disobey the statute and test the unreasonableness of the compensation fixed in all proceedings, civil and criminal, seeking to enforce the statute.*

The Rate Suit was brought for the determination of the question whether the statutory rate afforded just compensation for the use of the railway property. This is a question which the railway company had the right to have determined by the courts. The suit was instituted by filing a bill in equity, which is the method repeatedly approved by this court. The suit was brought against the members of the Corporation Commission, the body having general supervision and control of the subject matter of the statute and charged with the enforcement of the statute and against the Attorney General, who by statute is declared to be the attorney of the

Corporation Commission and whose duty it was to act in accordance with the Commissioner's request. We believe we have demonstrated that these defendants were proper defendants to the proceeding. We have further especially pointed out that every reason existing in the cases of *Smyth v. Ames* and *Prout v. Starr* to justify the propriety of those suits against the Board of Transportation and Attorney General of Nebraska applies with stronger force to sustain the propriety of the present Rate Suit against the Corporation Commission and the Attorney General of North Carolina.

We have also pointed out that there has never been a rate case where all the parties in interest were before the court, and that generally the real parties in interest, to wit, the shippers and passengers, have never personally been before the court at all.

It would, of course, have been impossible to bring before the court all the individuals interested in the enforcement of the rates prescribed by the statute, and this has been equally true with respect to every rate case which has ever been instituted.

No other individual or set of individuals could have been selected who would have been more appropriate as defendants to the proceeding than the defendants selected here. If, then, this proceeding was not an appropriate one to bring before the court, the essentially judicial question as to whether the compensation prescribed for the use of the company's property was reasonable, it was impossible to bring any proceeding which could have accomplished that purpose.

We come, therefore, to the proposition that unless the Circuit Court of the United States for the Eastern District of North Carolina could take jurisdiction of the Rate Suit, and therein could determine the judicial question involved, and could protect and enforce its jurisdiction by preventing any interference with the corporation or with its officers or agents for doing those acts which in the judgment of the court were proper pending the final determination of the

case, then there was no possible proceeding wherein the company could have the judicial determination to which it is entitled, of the essentially judicial question involved as to the reasonableness of the statutory compensation for the legitimate use of property, except by treating the statute as a nullity, declining to obey it and attempting to demonstrate the unconstitutionality of the statute in all proceedings brought against the corporation and against its officers and agents on account of such failure to comply with the statute. This being true, we contend that all the penal provisions of the statute are necessarily unconstitutional, because the effect of those provisions is to burden to an unreasonable extent, and indeed to destroy, the constitutional right of the railroad company to a judicial determination of the question involved.

> (*d*) *If a judicial determination can be had only by disobeying the statute, it is unconstitutional to burden judicial review by the imposition for such disobedience of the penalties prescribed in the passenger-rate statute.*

The passenger-rate statute provides that any agent, servant, or employee of any railroad company violating the act shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. The railroad company can act only through its agents, servants, and employees. The company, for the purpose of obtaining a judicial determination of the unreasonableness of the compensation prescribed by the statute, must disregard or violate the statute through some agent and not otherwise. It will be necessary for some ticket agent to sell a ticket at a higher rate than the rate prescribed by the statute, or for some conductor to collect upon the train a higher rate than that prescribed by the statute. Therefore for the railroad company to get the judicial review to which

it is entitled it is an indispensable preliminary step that it shall be able to induce its agents to disregard the statute.

Yet the statute declares to every agent, servant, and employee of the company that his violation of the statute subjects him to the charge of having committed a crime and to the risk of punishment by either fine or imprisonment, or both, in the unlimited discretion of the court. The statute denounces as a criminal every agent of the railroad company who participates in the step which is absolutely necessary as a preliminary to any judicial inquiry and threatens him with punishment of the most degrading character.

This feature of the statute itself amounts to an unconstitutional burden upon the railroad companies' right of a judicial review. If the Constitution of the United States gives to the railroad company the right to question in court the reasonableness of the compensation prescribed by the statute, then it is a defiance of that right and a manifest burden upon the exercise of that right for the statute to declare that any agent of the company who takes the step necessary to obtain that judicial review shall be regarded and treated as a criminal. It is easy to conceive that the demoralizing effect of such a denunciation may be such as of itself utterly to deprive the railroad company of any opportunity to question in court the reasonableness of the compensation prescribed by the statute.

In addition to the burden which grows out of the statute denouncing as a crime every one who participates in the steps necessary to the assertion of the right guaranteed by the Constitution of the United States the statutory penalties impose a further and an absolutely prohibitive burden upon the assertion of the constitutional right.

If the corporation can induce its agents, notwithstanding the denunciation of the statute, to disregard the statutory rate, and proceedings are brought in accordance with the declared purpose of the statute against the agents for such crime and by individuals against the corporation for the

money penalties, the result is that the agents must demonstrate the unreasonableness of the statutory rate or be fined or imprisoned, or both, in the discretion of the court, and the corporation must demonstrate the unreasonableness of the statutory rate or be subject to the penalties recoverable by individuals.

In other words, the State says:

> "I do not deny your right to a remedy under the Constitution of the United States, but if you presume to resort to that remedy and are unsuccessful I shall visit upon you as a penalty for your resort to that remedy a liability and forfeiture which will exceed a thousandfold the amount involved in the controversy and will impose upon the agents who have been criminal enough to co-operate with you in this purpose, penalties which in the discretion of the court may result in their degradation and imprisonment for life or the confiscation of all their property, or both."

We submit that any such scheme is a denial of the equal protection of the laws, contrary to the Fourteenth Amendment. No other person and no other corporation is subjected to any similar consequences for the assertion of a constitutional right of going into court. A more monstrous discrimination could not be imagined.

The practical result of this scheme is to coerce the corporation into observing the statutory rate, no matter how unconstitutional that rate may be. No other practical course is open. The corporation must comply with the rate as a less evil than the evil of taking the chance of the consequences of asserting its right in court. Therefore the necessary effect of the statute and its evident purpose is to deprive the company of its property without due process of law, because it compels the company to give its property to the public at a rate prescribed by the statute, and by the penal provisions intimidates the company from resorting to the only course which will admit of due process of law.

The only views with which we are familiar which have been expressed by the Federal judiciary with respect to such penalties are as follows:

In *Mercantile Trust Company v. Texas and Pacific R. Co.*, 51 Fed. Rep., 529, the Circuit Court of the United States held, in effect, that section 5 of the Texas act, which provided that the rates fixed by the Railroad Commission should be conclusive until finally declared to be otherwise, was unconstitutional, and with reference to the other provisions of the act (including those providing heavy penalties for disobedience of the rates prescribed by the Commission) said:

> "It clearly appears to me that every provision of this law that tends to thus enforce a compliance with the rates of the Commission, whether they be reasonable or not, and every provision tending to embarrass or enabling the Commissioners to embarrass such roads as may choose to invoke the protection of the Constitution against the taking of their property without the due process of law, or denying them the equal protection of the law, is affected with the same vice that renders section 5 invalid" (p. 543).

Upon appeal this court held it was unnecessary to pass upon the constitutionality of the penalties, because the section prescribing penalties might be dropped from the statute without affecting the validity of the remaining portions, and that for the purposes of the case before the court it might be conceded that the question was unconstitutional.

Reagan v. Farmers' Loan & Trust Co., 154 U. S., 362, 394.

In *Louisville & Nashville R. Co. v. McChord*, 103 Fed. Rep., 216, 224, the court said:

> "If it had been the intention of the legislature to recognize the right to a judicial investiga on of

> the reasonableness of the rates fixed under the provisions of the act, and to afford an opportunity therefor before a conviction upon an indictment for extortion, it would have said so in unmistakable terms in order that the accused might not be left to the doubtful chances of mere construction, not only as to the existence of that right, but as to the competency of a criminal court in a criminal case, without a Commissioner or adequate equipment to enforce it. It is indeed manifest from the entire scope and plan of the enactment, and its operation upon mere isolated cases only, that it was the purpose to exclude all inquiry upon that subject after the Commission had acted, and to enforce by rigorous and extravagant penalties the rates thus fixed, however reasonably and earnestly the railroad might desire to promptly have the question of the justness of those rates finally determined by a judicial inquiry. Upon the principles so often and so emphatically announced by the Supreme Court, this purpose thus plainly written in the legislation must be fatal to its validity."

This case also was appealed to this court, and the question presented for its consideration was whether the statute was void by reason of its penal provisions, but the court held that, as no rates had been fixed, the court had no jurisdiction to entertain a suit, and added:

> "We are not called on to dispose of other contentions of grave importance which were pressed in argument, as if now requiring adjudication."
>
> *McChord v. Louisville, etc. R. Co.*, 183 U. S., 483, 502.

In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S., 79, Mr. Justice Brewer pointed out some of the grave constitutional objections to penalties of this character (pp. 100, 101, 102,) and said:

> "In this feature of the case we are brought face to face with a question which legislation of other States is presenting. Do the laws secure to an indi-

> vidual an equal protection when he is allowed to come into court and make his claim or defense, subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss? * * * Suppose a law which, while opening the doors of the courts to all litigants, provided that a failure of any plaintiff or defendant to make good his entire claim or entire defense should subject him to a forfeiture of all his property or to some other great penalty; then, even if as all litigants were treated alike, it could be said that there was equal protection of the laws, would not such burden upon all be adjudged a denial of due process of law? * * * It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all individuals or corporations, and if extremes and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

In *Consolidated Gas Co. v. Mayer*, 146 Fed. Rep., 150, 154, the court said:

> "Long before this test suit could be heard next fall, the aggregate of the penalties incurred would utterly wipe out the entire property of the complainant, whether it were worth the amount found by the gas commission, or were worth the highest estimate at which the most astute and experienced financiers might capitalize it."

The court then quoted a portion of the language just quoted from Mr. Justice Brewer's opinion in the Cotting case, and added:

> "In the case cited the judges who concurred in reversing the judgment appealed from did so upon another ground, but the language of Mr. Justice Brewer, dictum though it be, commends itself as a clear and forceful exposition of the law.
>
> "It is difficult to see in what respect the provisions of the two acts now under consideration differ from those passed upon in the Kansas City Stock Yards case, except that they are perhaps more drastic. On this branch of the case there is no controversy as to the facts, and under the opinion last quoted, these provisions seem obnoxious to the Fourteenth Amendment to the Constitution of the United States. In order, therefore, to secure to the complainant its right to prosecute this suit to its orderly conclusion, without meanwhile being trammeled—or, as it may be more appropriately expressed, overwhelmed—by multitudinous actions for cumulative penalties, the temporary injunction which restrains the public officers, who are made defendants, and any one else whom the injunction may reach and hold, from enforcing, or attempting to enforce, the provisions of the acts and order of the gas commission against the complainant, will be continued until final hearing and decision of the cause in this court."

The court below in the present case held that these penal provisions of the statute were unconstitutional. The court said:

> "In the case of *Railroad Company v. Minn.*, 134 U. S., 456; 10 Sup. Ct., 702; 33 L. Ed., 970, it was held by the Supreme Court of Minnesota that the act in fixing rates was conclusive, and there could be no inquiry into such rates by judicial tribunals. Accepting this construction of the Minnesota act by the Supreme Court of that State, the Supreme Court of the United States declared the act unconstitutional, because it denied the railroad company a judicial

investigation into the validity of the rates. If this cannot be accomplished directly, it cannot be done indirectly. It is well settled that what cannot be done by express enactment cannot be done by device or indirection. Therefore any system of penalties which is intended to have the effect, and which is so framed as to have the effect, of closing the doors of the courts to a judicial inquiry as to rates, is in consequence of that fact unconstitutional and void. Section 4 of the act in qustion clearly attempts to do this. It imposes upon the company as a penalty for an unsuccessful attempt to appeal to the courts, no matter how *bona fide* this bill is made, such enormous fines and penalties in favor of individuals as to burden the challenger of the act in the courts, so as to make it, if the penalties were valid, practically impossible for such an appeal to be made" (pp. 196, 197).

The court then quoted from the language of Mr. Justice Brewer in the Cotting case and added:

"The evidence shows that one case under this provision of the act has already been tried in the superior court of Wade County against the complainant as a corporation and one of its agents at that place. In that case the court imposed a fine of $30,000 against the company, and notified the agent that, if he would stop selling tickets at a price that was authorized by the decree of this court, the judge would impose a nominal punishment, but, if he did not, the court would not say what it would do until it had received an answer. In making this reference the court does not wish to be understood as criticising the State court, for there is no one in the State for whom the court entertains a higher regard than Judge Long. It is also shown by the uncontradicted evidence in this case that at least 5,000 tickets are sold daily by complainant at its various offices in the State, in its intrastate business, thereby making it possible for it to be sued 5,000 times in one day for penalties amounting to $500 in each instance on account of its failure to comply with the statute fixing passenger rates. Thus it will be seen that by an en-

forcement of the statute judgments can be obtained against the complainant for the sum of $2,500,000 for each day. The aggregate penalties for which judgment could be obtained for one day would amount to a sum more than eight times as much as the sum involved in the original suit would be for one year.

"This system of legislation is also condemned by Judge Lacombe, in the case of *Consolidated Gas Co. v. Mayer* (C. C.), 146 Fed., 150, and the conclusion is irresistible, from what this distinguished jurist has to say, that such a system of penalties is unconstitutional and void. This not only applies to penalties in favor of individuals against the company, but also as to penalties against agents of the company which would render it utterly impossible for the company to carry on its business while having an orderly inquiry made by the courts as to its constitutional rights."

"The court, therefore, is of the opinion that the section of the act attempting to impose penalties and fines is unconstitutional and void upon its face (p. 198).

In *Perkins v. Northern Pacific Ry. Co.*, 155 Fed. Rep., 445, 449, the court said:

"And it seems to me, in view of the severe penalties denounced by these acts of the legislature, that the officers of the corporations could not have done otherwise than to have refused to act under those circumstances, where their action would have laid them liable to severe penalties; and every subordinate, who under their direction should attempt to violate these provisions, being also liable to like penalties, would also refuse. There is no question but that such legislation is vicious, almost a disgrace to the civilization of the age, and a reproach upon the intelligence and sense of justice of any legislature which could enact provisions of that kind. In case of the refusal to issue a ticket at a certain rate which is fixed by the legislature as proper, but which the railroad companies hold to be void and unconstitutional (and which would be an act of itself not immoral nor

malum in se, but would ordinarily afford the person who was refused the privilege of a ticket a right of action against the railroad company), in case he was in the right and the refusal was wrong, there would be no question but that in a civil action any such person would receive an adequate remedy; there would be no danger that any court or jury would refuse to give ample damages. Beyond question, the result of actions of that kind would be that the damages would almost certainly border on the excessive, instead of failing to remunerate the party for any wrong he would suffer on account of such a refusal. But under the provisions of these laws, acts not immoral or wrong in themselves, but which are only unlawful because prohibited, would entail upon the person refusing to comply with such laws the position of being convicted of a felony. They make the refusal a felony, and impose a punishment very unusual—a fine that might be to the amount of $5,000, or imprisonment in the state prison to the extent of five years, or both, in the discretion of the court; punishments which are applied only to the very highest crimes short of homicide of which men are ever guilty; punishments which would be deemed adequate in cases of burglary, highway robbery, or crimes of the highest character, short, as I say, of homicide. There is no doubt that the directors and officers of railroad companies were entirely justified in refusing to take the hazard that would fall upon them (and their employés, if they acted under their advice) by taking any steps to save the stockholders from the consequences of these laws."

(c) Even if the intimidation of the penalties were eliminated, it would be unconstitutional to restrict to a defense in such an action the assertion of the property right involved.

We shall now show that, even if the railroad company and its agents were not precluded by the menace of the penalties from taking the steps necessary to make possible

a judicial proceeding in which the defense could be made that the statute is unconstitutional, no substantial judicial review in such judicial proceeding would be practicable.

(1) Company's right to judicial review would depend on grace of the opposition.

The assumption that there could be a judicial review by way of defense to an action for violation of the statute seems to proceed upon the idea that a test case would be made in which the constitutionality of the statute could be tried and then, pending final determination of that case, the company should comply with the statute.

Such suggestion involves the difficulty that the company's right to go into court depends upon the grace of officers of the State or of aggrieved passengers. If the company, to make a test case, violates the statute with respect to one or two transactions and then complies with the statute, it would be almost a certainty that the State officers and the persons aggrieved would omit to institute any proceedings against the company, preferring the undisturbed benefit of the subsequent acquiescence of the company in the statute to the inconvenience and possible (though remote) ultimate danger of an adverse decision; consequently in all probability the company must violate the statute a great many times and therefore subject itself and its agents to a vast multiplicity of actions, or it must obtain the coöperation of the State officers or individual passengers, in order that there may be any judicial proceeding at all. As was said in the case of *Bank of Kentucky v. Stone*, 88 Fed. Rep., 390:

> "The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party."

Moreover, any proceeding of this character instituted with the coöperation of a passenger would be destined to meet the fate of the Wellman case, 143 U. S., and the Gill case,

156 U. S. Such cases would be treated as moot cases, not properly and comprehensively presenting the question involved, and hence would not result in any effectual relief.

> (2) To avoid the consequences of continued disobedience the company, at least until final determination, would have to submit to a confiscatory rate.

But even if the necessary coöperation could be secured without being regarded as collusive, the further element is involved that pending the determination of the case the company must observe the statutory rate, no matter how confiscatory that rate may be. Thus it might come about that for several months or probably several years, pending a final determination of the case, the company would be constrained, in order to avoid the expense and vexation of a vast multiplicity of actions, to charge a rate which by degrees would be confiscating the company's property. In other words, the scheme would be one whereby the company for a very substantial period would be subjected to confiscation. The Constitution, however, operates as a continuing protection to property, and it is as obnoxious to the Constitution to confiscate the company's property for one year as it is to confiscate the company's property for ten years.

In *Smyth v. Ames* it was urged that the reduction attempted by the State of Nebraska affected only a small part of the company's total earnings. In response to this argument the court quoted with approval from the opinion of the Circuit Court as follows:

> "The fact that the State of Nebraska can reach only one-twentieth of the total earnings, gives it no greater right to make a reduction in respect to that one-twentieth than it would have, had it the power over the total earnings, and attempted in them a like per cent. of reduction. If it would be unreasonable to reduce the total earnings of these roads 29½ per cent., it is at least, *prima facie*, equally unreasonable to so reduce any single fractional part of such earning" (169 U. S., 543).

(3) Machinery of the court wholly inadequate to try the complex question.

A still further reason why a review of such a question by way of defense to a criminal proceeding against an agent or to an action by an individual for a penalty is that the machinery of the court in such a case is utterly unsuited to dealing with the question involved.

Such a proceeding, whether civil or criminal in form, would be tried by a jury. The questions involved would be principally questions of fact. The ultimate question of reasonableness of the rate would itself be a question of fact and would depend upon decisions upon a great many complicated elements, each of which would be a question of fact. All of these questions of fact would be tried by the jury.

The courts have had frequent occasion to point out the inability of a jury to deal effectively with questions of this character.

In *Louisville and Nashville R. Co. v. Railroad Commission of Tennessee*, 19 Fed. Rep., 679, the court considered a statute which left the question of the reasonableness of rates to a jury. After pointing out that the act recognized the railroad company's right to a fair return on the value of the railroad as assessed for taxation, the court said:

> "Suppose the value satisfactorily ascertained, how and upon what basis are the net earnings to be computed? Is the estimate to be based upon past receipts, current income or anticipated earnings? Is the accused corporation to be held to anticipate its future operations, foresee the amount of its receipts and expenditures, and accurately foreknow its future profits and losses, so as to be able to strike a balance in advance of actual results in order to make its charges conform to the requirements of the statute? If so, how far in the future must their knowledge extend? These are some of the many difficulties with which railroad companies are to be embarrassed, and

against which the act requires them to provide. But we will suppose these to have been successfully surmounted, and another and more obstinate problem remains. These corporations are, in addition to their expenses, allowed to charge at a rate that will insure a 'fair and just return' on the value of their property. But what is a fair and just return? This vital question is by the act left to the unqualified and unrestrained discretion of the jury. There is no legal standard erected whereby the jury can measure the amount. One jury may fix it at 2 or 3 per cent. per annum, while another jury may, in view of business contingencies and fluctuating values, allow 6, 8 or 10 per cent. and their action would be so far conclusive as to be beyond the revision of any reviewing court. The facts that the jury are to ascertain are, first, the net earnings; and secondly, what would be a 'fair and just return'? The ascertainment of net earnings involves necessarily an inquiry into the gross receipts and expenditures. May the jury revise the expense account, and if so, to what extent? Both the earnings and expenses vary in accordance with the exigencies of business. Are rates to be varied in accordance with the fluctuating fortunes of railroad operations? If so, a charge reasonable in itself and honestly made might be rendered extortionate, and hence criminal, by a reduction of expenses or an unexpected increase of business, or a charge honestly made on the supposition that 5 or 6 per cent. would be fair and just, might be converted into a crime by the verdict of a jury subsequently rendered, based, it may be, upon facts transpiring subsequent to the alleged violation of the law" (p. 692).

In *Winsor Coal Company v. Chicago & A. R. Co.*, 52 Fed. Rep., 716, the court pointed out that the legislature had established maximum rates and had provided for the further fixing of rates by the Railroad Commission, and held that an action could not be maintained for the excess over a just and reasonable rate when the rate charged did not exceed the rate fixed by the statute or by the Commission, and said:

> "What in the judgment of one jury in one locality would be an unreasonable charge might in the opinion of another jury in another locality be quite reasonable. With the known capriciousness of jury verdicts, influenced often by individual peculiarities, mental habits, the quantum and quality of the evidence in the particular case, how would it be possible to carry out the legislative intent to establish and maintain a uniform rate of charges? Would not the diversity of conclusions reached by different juries between different litigants in and of itself bring about discriminations and inequality? Under such a construction of this statute as contended for by plaintiff it is not apparent how any railroad company could safely do business in the State. Its agents could never know when they were safe in any charge by them made. After a schedule of rates has been approved and published, the statute makes it unlawful for the carrier to charge less than the scheduled rate, under the pains and penalties prescribed in the act; and yet, under plaintiff's theory the common carrier might be liable for the penalty of triple damages because it did not charge a lesser rate" (p. 720).

In *Van Patten v. Chicago, &c., Railway Co.*, 81 Fed. Rep., 545, the court held that a shipper could not maintain an action against a carrier for charging an unjust and unreasonable rate when the carrier had charged only the schedule rate published and filed in accordance with the Interstate Commerce Act, and said that if such an action could be maintained,

> "It results in the holding that it was the intent of Congress to place upon the courts and juries of the country the duty and burden of establishing the rates of transportation for interstate commerce and upon the common carrier the burden of transportation, with the right to ultimately retain as pay therefor the rate fixed by the verdict of a jury rendered perhaps five years after the rendition of the services. How is it possible for a jury to pass understandingly upon the questions which inhere in the establishment of

a properly proportioned and equalized schedule of transportation rates? Take this case as an example. As already stated the petition contains 23 counts, each count being based upon shipments made from a different point and at each point the shipments were made at many different times within the limits of from one to five years. Now the theory of the plaintiff is that the jury must inquire into and determine what the reasonable rate was for each shipment when made, and by comparing the reasonable rate thus fixed by the jury with that actually charged, determine whether the plaintiff is entitled to damages, and if so to ascertain the amount on each shipment made. It is self-apparent that no matter how intelligent the jury might be nor how conscientiously and carefully they might endeavor to deal with the problems thus submitted to them, it would be wholly impossible for them to reach a proper verdict under such circumstances. But suppose the case involved but a single shipment, would the difficulty be remedied if the theory of the plaintiff is to prevail? How could the jury fairly and understandingly deal even with the case of a single shipment, provided the duty is placed upon the jury of determining what a fair and reasonable charge for the particular service would be, unless some standard already recognized and established is given them for their guidance? It is impossible for the jury to deal with the questions of the total cost of building, equipping and operating the line of railway as a whole, the proportionate cost of the particular transportation in question, the total amount of business done over the entire system, the total burden properly to be laid upon the total business for transportation charges and the proper proportionate share which the particular shipment should bear" (p. 551).

The decision in *Smyth v. Ames*, 169 U. S., 466, clearly shows the extremely complex character of the questions involved in the determination of such a subject.

In *Chicago, &c., Co. v. Tompkins,* 176 U. S., 167, this court said:

> "Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a State legislature for the carriage of passengers and freight are unreasonable" (p. 172).
>
> "We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions are difficult, the interests are vast, and therefore the aid of the trial court should be had. The writer of this opinion appreciates the difficulties which attend a trial court in a case like this. In *Smyth v. Ames, supra,* a similar case, he, as circuit judge presiding in the Circuit Court of Nebraska, undertook the work of examining the testimony, making computations, and finding the facts. It was very laborious, and took several weeks. It was a work which really ought to have been done by a master. Very likely the practice pursued by him induced the trial judge in this case to personally examine the testimony and make the findings. We are all of opinion that a better practice is to refer the testimony to some competent master, to make all needed computations, and find fully the facts. It is hardly necessary to observe that in view of the difficulties and importance of such a case it is imperative that the most competent and reliable master, general or special, should be selected, for it is not a light matter to interfere with the legislation of a State in respect to the prescribing of rates, nor a light matter to permit such legislation to wreck large property interests" (p. 179).

It is unreasonable to expect any jury to be qualified to deal with questions of such complexity and difficulty or to assume that the machinery of any criminal court is adapted to the trial of such issues.

In *Bronson v. Kinzie,* 1 How., 311, this court considered whether a State law passed subsequently to the execution of a mortgage, relating to the remedy for enforcing the mort-

gage, amounted to an impairment of the obligation of the mortgage. The court said (p. 317):

> "It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract and the rights of a party under it may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void and one which took away all remedy to enforce them or encumbered it with conditions that rendered it useless or impracticable to pursue it." * * *

In speaking further of the function of the remedy the court said:

> "It is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which the clause in the Constitution now in question mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and abstract right without any practical operation upon the business of life."

The proposition that the company has an adequate remedy to test the constitutionality of this statute by submitting the question to a jury reduces the supposed right of the company under the Fourteenth Amendment to a "mere barren and abstract right without any practical operation upon the business of life."

(4) Such a trial could have no element of finality, even as to the past.

Even if the company and its agents were not deterred by the menace of these penalties from going into court; even if it could make a test case by the grace of the adverse parties; even if pending that particular judicial proceeding it was not forced to comply with the confiscatory rate; even if that judicial proceeding had appropriate machinery to give an adequate hearing; still the remedy would not be valuable because in the nature of things it would have about it no element of conclusiveness either as to the past or as to the future.

Even as to the past each transaction would stand upon its own merits, and the determination as to the validity of the statute would depend upon the conclusion of the jury in the particular case. There are countless elements in every question of this sort about which juries may disagree. The values of hundreds of pieces of property are involved; the character of thousands of elements of operating expenditures is involved; a countless number of incidents in the history of the capitalization and management of the company is involved; there is the widest possible range for disagreement as to the cost of performing the service; the fair rate of return upon the property; the question as to what part of the expense shall be borne by each class of traffic. Under such circumstances there would be no possible reason for assuming that the verdict of one jury would be the same as the verdict of another jury. Because one jury might hold the rate unconstitutional would be a practical discouragement to any other person desiring to insist that the rate is constitutional.

(5) Such trial would be even more inconclusive as to the future.

A statute prescribing rates operates upon the future, and it is the future operation of the statute which concerns the railroad company. The future operation of that statute must depend upon the court's best judgment as to the future effect of that statute upon the property of the railroad company. No judicial remedy can be of value to the company unless it can afford protection for the future.

A jury trial is confined to the situation as it existed at the time of the institution of the action. It cannot be conclusive as to a state of facts which may arise in the future. It may be a year or two years or longer between the institution of the action which is to serve as the test of the proceeding and the authority of decision of that action by the court of last resort. Even if the verdict of the jury should be to the effect that the statute is unconstitutional and the judgment upon this verdict should be affirmed by the court of last resort, still it would be open to every individual and to every State officer to contend that that verdict, even if it were conclusive as to all cases arising up to the time of the finding of the verdict, was not conclusive with respect to conditions existing at the time of the affirmance of the judgment rendered upon that verdict.

As was pointed out in *Smyth v. Ames*, rates confiscatory at one time might not be confiscatory at another; and every person having any interest, either official or private, to attack the railroad company for its disobedience of the statute would be justified in invoking this proposition as a reason for denying any conclusive effect of the verdict as to the future.

(6) The restriction of an owner of property to such a remedy would be a denial of the equal protection of the laws.

The controversy presented in any judicial review of a statute of this character is the question whether the rate proposed is a just compensation for a legitimate and necessary use of property which, though devoted to public service, is owned by private persons. If the owners of that property are entitled to any remedy in the premises, they are entitled to an adequate remedy, and to a remedy which is relatively adequate as compared with the remedies available to the other owners of property to protect them in their enjoyment of it.

The question of the value of the use of property is a question not confined to quasi-public corporations. It is a question concerning which every owner of property may find it necessary to resort to the courts. We do not find in the State of North Carolina any restriction whatever upon the right of any owner of private property to resort to a court of equity for a comprehensive determination of his rights with respect to property, and a restriction of his remedies absolutely to actions in courts of law under circumstances where only a court of equity can give an adequate remedy. While there are, of course, numerous grounds for classification whereby quasi-public service corporations may be subjected to different rules from those prescribed for the owners of private property, there is no valid basis for a denial to the owners of property devoted to public use of any adequate remedy whatever.

Nor do we find in North Carolina that the owners of any property devoted to a public service, other than railroad property, are restricted in their remedies with respect to just compensation for the use of their property to actions at law, where the circumstances are such that only a court of equity can give adequate relief. Apparently railroad companies alone have been singled out and discriminated against in this

respect, and a subject-matter imperatively demanding the consideration of a court of equity is sought to be confined exclusively to the determination of courts of law.

We submit that even if the menace of the penalties were not involved in the passage of the rate statute, yet, if that statute be construed as having the effect to exclude any opportunity to resort to a court of equity for an adequate determination of the questions involved, the result is a denial to the railroad companies of the equal protection of the laws. Not only is the remedy in equity under such circumstances the only adequate remedy, and not only are the railroad companies entitled to resort to that remedy so long as other property-owners (in matters where the necessity for resort to equity is far less) are permitted to resort to equity, but the peculiar circumstances of the subject-matter presented are such that trials of the right involved in proceedings by prosecuting officers or individuals are utterly and hopelessly inadequate, and cannot possibly accomplish the purpose for which the railroad company has the right to resort to the court at all.

2. THE PENAL PROVISIONS OF THE PASSENGER-RATE STATUTE BEING CONTRARY TO THE CONSTITUTION OF THE UNITED STATES, THE ORDER OF DISCHARGE WAS PROPER.

The right of a Circuit Court of the United States in a proper case to discharge a person who is in custody in violation of the Constitution of the United States is not questioned.

The propriety of discharging the prisoner in the present case seems equally beyond question.

If the Circuit Court had no jurisdiction of the Rate suit, the penal provisions of the passenger statute were contrary to the Constitution of the United States, for the reason that they amount to an unjust and prohibitive burden upon a resort to

the courts for a judicial determination of the judicial questions involved, and under no circumstances could afford an adequate remedy. It would have been the extremity of injustice to Wood and the other agents of the railroad company to permit them to remain in confinement pending the bringing of their cases to this court by writ of error to the highest State court having jurisdiction, and any such course would have effectuated the unconstitutional purpose of the passenger-rate statute.

Clearly, where the purpose of a statute is to compel a railroad company, without any judicial determination of the reasonableness of a statutory compensation, to give the use of its property for that compensation, and an unconstitutional plan is adopted for accomplishing this purpose, it is eminently proper to release from custody agents of the railroad company who are confined by virtue of, and as a part of, the unconstitutional plan of the legislature.

A distinct reason for interference by writ of *habeas corpus*, and a reason of the utmost importance, is the fact that the railroad company was a carrier of the United States mails, and was engaged in interstate commerce far more important in amount and extent than the intrastate commerce in which it was engaged in North Carolina. As shown by the opinion of the Circuit Court, the carrying out of the policy of the State to imprison the agents of the company under the unconstitutional penal provisions of the passenger-rate statute would have paralyzed the ability of the company to carry the mails and to conduct its interstate transportation business. These circumstances constituted a condition of the utmost urgency, and fully justified the release upon writs of *habeas corpus* of Wood and any other agents confined by virtue of the same unconstitutional provision.

There have been numerous instances of discharge upon writs of *habeas corpus* of persons in custody in violation of the Constitution of the United States, and it is not believed

that any case has presented circumstances of more serious urgency than those presented here.

Minnesota *v.* Barber, 136 U. S., 313.
Boske *v.* Comingore, 177 U. S., 459.
In re Ah Jow, 29 Fed., 181.
In re Davenport, 102 Fed., 540.

We respectfully submit that the judgment of the Circuit Court should be affirmed.

WALKER D. HINES,
Of Counsel.

DECEMBER 17, 1907.

ALFRED P. THOM,
ALEX. P. HUMPHREY,
WALKER D. HINES,
Counsel.

APPENDIX I.

PROVISIONS OF NORTH CAROLINA STATUTES.

"The Corporation Commission shall have such general control and supervision of all railroad, street railway, steamboat, canal, express and sleeping car companies or corporations and of all other companies or corporations engaged in the carrying of freight or passengers, of all telegraph and telephone companies, of all public and private banks and all loan and trust companies or corporations, and of all building and loan associations or companies, necessary to carry into effect the provisions of this chapter, and the laws regulating such companies."

(Revisal of 1905, sec. 1066.)

PROVISIONS OF NEBRASKA STATUTES.

"That the board hereby created shall have authority to inquire into the management of the business of all common carriers, subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the board to perform the duties and carry out the objects for which it was created." * * *

(Compiled Statutes of Nebraska, ch. 72, art. VIII, sec. 12.)

"* * * said board (of transportation) shall have the general supervision of all railroads operated by steam in the State, and shall inquire into any neglect of duty or violation of any of the laws of this State by railroad corporations doing business in this State or by any officer, agent, or employee of any railroad cor-

poration doing business in this State." * * *

(Compiled Statutes of Nebraska, 1893, ch. 72, art. VIII, sec. 17.)

"The Commission, whenever in its judgment any corporation has violated any law, shall give notice thereof in writing to such corporation, and, if the violation or neglect is continued after such notice shall forthwith present the facts to the Attorney General, who shall take such proceedings thereon as he may deem expedient."

(Revisal of 1905, sec. 1113.)

No corresponding provision in Nebraska statutes.

"It shall be the duty of the Attorney General:

"1. To defend all actions in the Supreme Court in which the State shall be interested or is a party, and also when requested by the Governor or either branch of the General Assembly to appear for the State in any other court or tribunal in any cause or matter civil or criminal in which the State may be a party or interested."

(Revisal of 1905, sec. 5380, sub.-sec. 1.)

"The Attorney General shall appear for the State and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court in which the State shall be interested or a party, and shall also when requested by the Governor or either branch of the legislature appear for the State and prosecute and defend in any other court or before any officer any cause or matter, civil or criminal in which the State may be a party or interested.

(Compiled Statutes of Nebraska, 1893, ch. 83, art. V, sec. 1a.)

"The Attorney General may on his own motion or whenever thereunto requested by any officer of the Executive Department having charge of any official bond, contract or matter shall upon a breach thereof prosecute any official bond deposited in any office of the Executive Department or any contract in which the State is interested and may and when so requested shall bring, prosecute and defend for the State any suit, matter or thing, civil or criminal, in which the State is interested or relating to any matter connected with the Executive Department."*

(Ch. 83, art. V, sec. 2.)

*Sec. 1 of Art. 5, of the Constitution of Nebraska provides that "The Executive Department shall consist of a Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Superintendent of Public Instruction, Attorney General, and Commissioner of Public Lands and Buildings."

"At the request of the * * * Corporation Commissioners * * * he (Attorney General) shall prosecute and defend all suits relating to matters connected with their departments."

(Revisal 1905, sec. 5380, sub.-sec. 2.)

No corresponding provision in the Nebraska statutes authorizing the Board of Transportation to require the services of the Attorney General.

(It shall be the duty of the Attorney General) "to consult with and advise the Solicitors, when requested by them in all matters pertaining to the duties of their office."

(Revisal 1905, sec. 5380, sub.-sec. 4.)

"The Attorney General shall consult with and advise the District Attorneys when requested by them in all matters pertaining to the duties of their office; * * *"

(Compiled Statutes of Nebraska, 1893, ch. 83, art. V, sec. 3.)

"* * * The North Carolina Corporation Commission shall publish the rates fixed by this act for the several railroads operating in this State on or before the first day of June, 1907."

(Sec. 2 of act of March 2, 1907, in respect to passenger rates.)

No corresponding provision in the Nebraska rate statute involved in Smyth *v.* Ames.

"That mileage books of one thousand miles in each book shall be kept on sale at such railroad ticket offices in North Carolina as shall be named and designated by the Corporation Commission of North Carolina and when such mileage book is purchased it shall be good in the hands of any person or persons named therein on all railroads on which the fare is the same as or less than the fare on the road of the company selling such mileage book; * * *"

(Sec. 3 of the act of March 2, 1907, in respect to passenger rates.)

No corresponding provision in the Nebraska rate statute involved in the case of Smyth *v.* Ames.

"That the Corporation Commission created by the laws of North Carolina shall not in fixing the maximum rates and charges * * * permit or allow any such common carrier to charge, * * * a greater * * * rate for the transportation of any article * * * where the initial point of shipment is on the road or line of one common carrier in this State and the terminal point of said shipment is on the line or road of another common carrier in this State, than is the sum of the present local rates now established, prescribed or approved by said Corporation Commission, less a reduction of 25 per centum. * * *" (Sec. 1 of the act of March 9, 1907, in respect to freight rates.)	No corresponding provision in the Nebraska rate statute involved in the case of Smyth *v.* Ames.
"The Corporation Commission is hereby directed to prepare and publish the tariff of rates, charges and tolls to be charged and collected by railroad companies in this State as authorized by this act on or before July 1, 1907." (Sec. 5 of the act of March 9, 1907, in respect to freight rates.)	No corresponding provision in the Nebraska rate statute involved in the case of Smyth *v.* Ames.

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CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 474.

THOMAS F. HUNTER, SHERIFF OF BUNCOMBE COUNTY, NORTH CAROLINA, APPELLANT,

v.

JAMES H. WOOD, APPELLEE.

SUPPLEMENTAL BRIEF FOR APPELLEE.

ALEX. P. HUMPHREY,
WALKER D. HINES,
ALFRED P. THOM,
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IN THE

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SUPPLEMENTAL BRIEF FOR APPELLEE.

We desire by way of supplement to the briefs for appellee filed on the hearing of the cause, to make a few suggestions responsive to the brief filed for appellant, and to the position as taken by counsel for the appellant on the oral argument.

1. The appellant relies upon the opinion of the Supreme Court of North Carolina in the case of Southern Railway Company, plaintiff in error, against the State of North Carolina, recently decided, printed copy of which is filed with appellant's brief.

We submit that an examination of this opinion, so far from showing that the rate case brought by the Southern Railway Company was not within the jurisdiction of the Circuit Court of the United Stat[illegible] shows that the case fell within the principles of Smyth *v.* [illegible]es.

The case arose out of the indictment in Wake County, North Carolina, of the Southern Railway Company and Green, one of its agents. Both defendants were convicted, the Southern Railway Company being fined thirty thousand dollars. Green after conviction was asked whether he would agree to desist from selling tickets in the manner prescribed in the order of the Federal court, the court saying that if he did so it would impose a nominal fine, but if he would not so promise, the court would further consider what should be the sentence. Green made the suggested promise and was thereupon fined five dollars, and did not appeal. The Southern Railway Company did appeal. The Supreme Court of North Carolina reversed the judgment against the Southern Railway Company, upon the ground that the passenger rate act, having prescribed, as its only penalty against the railroad company, the right of individuals to maintain penal actions, the company could not be indicted by the State for a misdemeanor. This was all that was necessary to the decision. The court, however, undertook to examine the question as to whether the Circuit Court of the United States had jurisdiction of the rate suit. The result, however, of the examination by the court is that the court held that under the laws of North Carolina the passenger rate act could be enforced by officers of the State of North Carolina, other than the Corporation Commission and the Attorney-General. While the court said that the statute was self-executing, it did not decide that there was no duty respecting its enforcement laid by the statute law of North Carolina on the Railroad Commission and the Attorney-General. On the contrary, the court used this language at page 14:

> "There is nothing in our act which makes its operation depend at all upon anything to be done by the corporation commission, or the Attorney General or his assistant. The said officers last named are required to prosecute in the name of the State any crime committed in violation of the act, but *Ex parte* Ayres is direct authority that they cannot be reached by an

> injunction while in the performance of this official duty. Besides, can it be said, with any show of reason, or even with the sanction of plausible argument, that a suit for an injunction directed against the Attorney General in the prosecution of criminal cases, in which the State under our law, and the sovereign under all law, is the plaintiff of record and too the real plaintiff, is not in its very nature and in its natural and necessary effect, a suit against the State? Can it be said, in answer to this suggestion, that the State can proceed against criminals, and yet at the same time, that she can be deprived of all power to do so by her duly constituted law officers, charged with the duty of enforcing the criminal law? The injunction had just as well be issued against the grand juries or the judges who preside in her courts."

The court distinctly recognizes the statutory duty of the Attorney General to enforce the passenger rate statute and fails entirely to notice or construe that by virtue of section 1113 of North Carolina Revisal of 1905 it was the express statutory duty of the Corporation Commission to enforce the statute. Thus under the laws of North Carolina, even in the light of this opinion, the connection of the Corporation Commission and the Attorney General with the enforcement of this statute is much clearer than was the connection of the Board of Transportation and the Attorney General of Nebraska with the enforcement of the rate statute involved in Smyth *v.* Ames. The court holds that no action of the Commission was necessary as a condition precedent to the rates going into effect, and the same condition was equally true with respect to the rate statute involved in Smyth *v.* Ames.

If, however, it were to be conceded that the opinion of the Supreme Court of North Carolina in the case under consideration is an authority against us, still, at most, it is only persuasive. It has been frequently held by this court that where a construction of a State statute is a matter of determination in a Federal court, neither the court of first

instance nor this court is bound by the construction of that statute made by a State court in a suit filed after the jurisdiction of the Federal court had been first invoked.

Julian *v.* Central Trust Co., 193 U. S., 103.
Burgess *v.* Seligman, 107 U. S., 20.

Nor is it believed that any authority can be found holding that the construction by a State court of a State statute in a matter involving the jurisdiction of a Federal court is binding upon a Federal court.

To the suggestion made in the opinion as to issuing injunctions against grand juries or the judges who preside in the courts of North Carolina, several answers may be made.

The fact that an injunction is not a perfect remedy is not a reason for not employing the remedy at all. It may be that a court cannot enforce an injunction by proceedings for contempt against grand juries or judges, but it can enforce it against other parties. Moreover, there are other remedies which can be applied in aid of the injunction against the action, even of grand juries or judges. It is, we repeat, no vital objection to any remedy that it is not a complete remedy.

Again, it is to be observed that this court will assume that the grand juries and judges of the State courts will, when the law has been declared by this court, conform thereto, and, therefore, if this court shall hold that the Southern Railway Company had the right to implead the North Carolina Corporation Commission and the Attorney General and obtain the interlocutory injunction, which it did obtain, and that the result of this is to prevent the State courts from doing anything which impedes or restricts the execution of the processes of the Federal court, neither grand juries nor judges, nor any other officers of the State, will attempt to do anything which is contrary to the law as thus declared by the tribunals having power to finally determine such matters.

This objection to the exercise of judicial power to grant an injunction in a rate suit goes far beyond this special

branch of jurisprudence. The objection, if valid, would render practicable the destruction of the judicial power of the Circuit Courts of the United States in any suit arising under the Fourteenth Amendment or the Commerce Clause. The objection, if valid, might result in the Federal courts being compelled to surrender portions of their jurisdiction in bankruptcy, admiralty and maritime matters, in all of which their jurisdiction is expressly made by the Constitution of the United States of paramount authority to any action taken by the tribunals of the State.

But a Federal court, without in any way interfering with the functions of the grand jury or judge, has ample methods of protecting its jurisdiction against any invasion which may be brought about by the exercise of criminal process; as, for example, by writ of injunction to prevent the collection of a money judgment, or by writ of *habeas corpus* to prevent the imprisonment of an individual.

It is assumed throughout the opinion of the Supreme Court of North Carolina in Southern Railway Company *v.* State, as well as throughout the argument of opposing counsel in this case, that there is some fundamental jurisdictional obstacle in the way of any court of equity upon the ground of the unconstitutionality of a State statute, restraining the assertion of a right claimed under that statute until there shall have been a final determination by the court of last resort that the statute is unconstitutional. We have already pointed out that a right asserted under a State statute is no more sacred than a right asserted by virtue of the common law or by virtue of any other condition which it is claimed brings a right into existence.

We wish to supplement this by calling attention to the fact that in numerous cases where this court has held that a suit may be maintained against State officers to restrain them from enforcing an unconstitutional statute, there have been restraining orders or interlocutory injunctions which, prior to any determination that the statute was unconstitutional, have served to restrain the effort to enforce the statute. We

have cited a number of these cases in the briefs already on file. In addition to these, we may call attention to the following cases which came to this court:

Osborne *v.* Bank of the U. S., 9 Wheat., 738.
Allen *v.* B. & O. R. R., 114 U. S., 311.
Cummings *v.* Bank, 101 U. S., 153.
In re Tyler, 149 U. S., 164.
Board of Liquidation *v.* McComb, 92 U. S., 531.

We have already called attention to the fact that in practically all of the rate cases, both in this court and in the inferior Federal courts, restraining orders and interlocutory injunctions have been granted temporarily suspending the enforcement of the rates the constitutionality of which was questioned.

A suggestion was made on the argument by counsel for the appellant to the following purport: It was said that as the Southern Railway Company could not sue the State of North Carolina, therefore, a decree rendered in the cause, either interlocutory or final, would not be binding upon the State of North Carolina. It was argued from this, that notwithstanding such decree, the State of North Carolina, through the machinery of its criminal courts, could indict persons who had charged a rate greater than that fixed in the acts relative thereto, and that the decree rendered in the rate case could not be interposed as conclusive of the validity of the act. This argument, of course, is equally applicable to a state of case where the final judgment has been rendered in favor of the carrier and this judgment has been affirmed in this court, as to a state of case where the court of first instance has issued an interlocutory injunction, and the case has not yet been tried. If the interlocutory order is not binding, neither is the final decree nor the affirmance of the final decree binding. If this is the law, then the remedy which this court has sanctioned in many cases involving these questions is a vain and futile one, and dependent en-

tirely upon the will of the State. The fundamental vice in this argument arises from its disregard of the real nature of suits challenging the validity of State legislation in reference to the rates to be charged by common carriers. The only persons pecuniarily interested in these rates, and, therefore, in any litigation arising out of statutes or orders of commissions fixing them, are the carrier, upon the one side, and shippers and travelers upon the other. When such rights have been determined in a suit where the carrier is represented upon the one side and the public is represented upon the other, the ultimate determination of the matter must be conclusive, because all persons interested are before the court, and have had opportunity to take part in, and have taken part in, the ascertainment of the result.

In the cases cited by the counsel for the appellant as illustrative of their contention (United States *v.* Lee, 106 U. S., 196; Tindall *v.* Wesley, 167 U. S., 204), it is to be observed that in the one the United States, and in the other, the State of South Carolina, might, notwithstanding the judgment, claim the property which was the subject-matter of the suit. But in the rate cases, if we have correctly stated their character, there is no property interest whatsoever in the State, the whole property interest being combined in the carrier, shippers, and travelers.

Again, the only purpose of any action upon the part of the State in a criminal proceeding or otherwise, with respect to a statutory rate which had been the subject matter of a suit in a Federal court, would be to secure the enforcement of that rate for the benefit of the individuals interested therein, either by some mandatory process or by imposing punishment for the failure to observe that rate. Now, if the Federal court had jurisdiction of the subject matter, to wit, of the question whether the railroad property should or should not be subjected to the public use for the rate of compensation specified by the statute, and had acted upon that subject matter by a decree restraining the enforcement

of that rate, then any action taken by any individual, whether at the instance of the State or not, designed to compel the enforcement of that rate, the decree of the Federal court to the contrary notwithstanding, would clearly be an obstruction of the process of the Federal court, and consequently a criminal contempt of its authority.

In re Lennon, 166 U. S., 548.
In re Reese, 107 Fed., 942.
Chisolm *v.* Caines, 121 Fed., 397.
Bessett *v.* Conkey, 194 U. S., 334.

In the last argument of counsel for appellant, a violation of the passenger rate statute of North Carolina was declared to be properly punishable, just as the crime of larceny is punishable. If this is a true view of rate laws, then the whole basis governing their consideration by this court, and the other courts of the United States, is swept away. In other words, if a statute fixing rates and imposing penalties therefor is analogous to statutes prohibiting larceny, burglary, and other similar offenses, then the jurisprudence on the subject of rate legislation must be reconstructed from its very foundation.

To be read after first new paragraph on page 8.

What is involved in this case is the taking of property—not the abstract right of a State to enforce its criminal laws. It is whether a State can, by means of its criminal laws or otherwise, take the property of a person contrary to the Constitution. The contention of the appellee is that a State cannot take the property of a person without giving an opportunity, unburdened and unpenalized either by statutory or common-law penalties, by means of which opportunity the person whose property is taken may assert his constitutional rights to his property, and that in cases within their jurisdiction the right of the person to assert his constitutional rights in the circuit courts of the United States must not be denied by a State.

likewise be liable to prosecution and conviction for every act done by them pending the litigation.

A plain statement of this proposition is its strongest refutation. The North Carolina passenger rate statute provides that every passenger who is charged more than 2¼ cents per mile for his ticket can have an action against the carrier for $500.00. It further provides that every agent and employee of the carrier who shall sell a ticket at a greater rate than 2¼ cents per mile shall be guilty of a misdemeanor, and subject to indictment and to punishment by a fine unlimited in amount, and by imprisonment of two years, to be worked out on the public roads.

The proposition is this: If the Circuit Court of the United States grants an interlocutory injunction, providing, as has here been done, a method by which tickets shall be sold at a greater rate than 2¼ cents, and shall finally grant a permanent injunction, holding that the rates are confiscatory, and the case shall then come to this court, there will certainly be consumed as much as two or three years before there is a final determination of the matter in controversy. During this entire period of waiting, every agent of Southern Railway Company who sells a ticket in North Carolina at a greater rate than 2¼ cents, is guilty of a crime, and subject to the degrading punishment indicated. When the case is brought here and submitted to this court for determination, every 24 hours of time which this court takes in the examination of the facts and the law, is rendering 500 people guilty of innumerable offenses for which they are subject to a punishment which would be overwhelming in its consequences.

To assert this doctrine is entirely to separate rate cases, their conduct, their consideration, the judicial power exercised in reference to them, from the whole body of equitable jurisprudence. It is to make of these rate cases a jurisprudence separate and apart, and barren of analogy to any other cases of equitable jurisprudence. For we confidently assert that

there is no principle of equitable jurisprudence more firmly settled than that it is within the competency of a court of equity to stay the hands of the defendant, pending the determination of the complainant's rights, upon such terms as seem to the court to be equitable, and that the complainant, at the conclusion of the litigation, can be visited with no consequences, except such as may be determined by the decree. The judicial power of a court of equity enables it to impose terms, but beyond these terms and their enforcement, the defendant can have no right, otherwise than in the exceptional instance of an action for malicious prosecution. Under the 93d Rule, if the Circuit Court should dismiss the bill, it can still continue the restraining power of the interlocutory injunction originally granted. The power to fix terms necessarily involves the power to make those terms exclusive—or, to state it more accurately, when terms are fixed, either for the granting of an interlocutory injunction, or for the suspension of an order dissolving an injunction, no other terms are binding upon the party in whose favor the order is made. Necessarily, such an order embraces the whole subject matter. Equity would never permit such penalties to be enforced, even against an unsuccessful litigant, if the litigation was instituted and conducted in good faith.

Opposing counsel attempt to meet the proposition that the penalties are unconstitutional by the argument that, if the penal provisions of the passenger rate statute are unconstitutional, such condition does not render unconstitutional the provisions of the statute declaring that the lawful passenger rate shall be 2¼ cents per mile, and that, this provision remaining lawful, it becomes a misdemeanor at common law for any person to violate this statutory provision. The implication seems to be that by no possibility can there be any evasion of the penalty existing by virtue of the common law.

It is unnecessary, for the purposes of this case, to explore the doctrine as to whether, at common law, it is a misde-

meanor to violate a statute of this character. If such a violation would be a misdemeanor, it would seem equally to be a misdemeanor to violate a statute against usury.

As a matter of legislative intention and construction, the argument of counsel is entirely unsound. The State of North Carolina, we will assume, passes a law providing that a carrier shall not charge more than 2¼ cents per mile. With a view to enforcing its mandate, it provides that every passenger who buys a ticket sold at a greater rate shall be entitled to sue the carrier for $500.00. It further provides that every agent violating the act shall be guilty of a misdemeanor, and punished in the terms of the statute, by fine and imprisonment, in the discretion of the court.

Now, these are the punishments which the legislature of North Carolina intended should be visited upon the one hand on the company, and upon the other hand on the agent, for violation of this act. No other punishments could have been within the intention of the legislature of North Carolina. The Supreme Court of North Carolina, in the case of Southern Railway Company *v.* North Carolina, on a writ of error from Wake County, decided that Southern Railway Company could not be indicted for a misdemeanor under this statute, because the legislature had fixed another punishment, namely, a penal action in favor of the purchaser of the ticket. If, therefore, the punishments announced by this act are unconstitutional, it cannot be asserted that the legislature of North Carolina would have visited either the railroad company or the agent with a common law punishment for a misdemeanor. It would be, indeed, a new construction of a criminal statute, to say that the court was not only at liberty to strike out of such statute its penal sections, but also to determine that, in lieu of such penal sections, there was thereby substituted other penal sections. There can be no crime and no punishment for a crime under a legislative mandate, unless both are distinctly demanded by the terms of the act as passed by the enacting power.

But, assuming that counsel are correct in the proposition that it would be a common law misdemeanor for any corporation or any agent of a corporation to violate the first section of the passenger rate statute, such condition does not destroy the operation of the Constitution of the United States. It is no more within the constitutional power of the legislature to fit a scheme of confiscation into common-law penalties than to fit such a scheme into statutory penalties.

The entire argument on behalf of opposing counsel proceeds upon theories which, if sound, wholly undermine the jurisdiction of the Federal courts in all rate cases, and upon the theory that any legislative declaration as to the compensation for which a railroad shall be devoted to the public use, must be considered only in the courts of the State, and never in the courts of the United States, except when brought upon a writ of error to this court from the highest State court having jurisdiction; and also upon the theory that the railroad company must, for protection against the harsh and even destructive method of enforcing statutes prescribing rates, look entirely to the clemency of the officers of the State; and upon the further theory that, pending the final determination of the so-called judicial review, the carrier will have to submit to the confiscatory rate.

Respectfully submitted.

ALEX. P. HUMPHREY,
WALKER D. HINES,
ALFRED P. THOM,
Counsel.

DECEMBER 20, 1907.

No. 474.

OPINION

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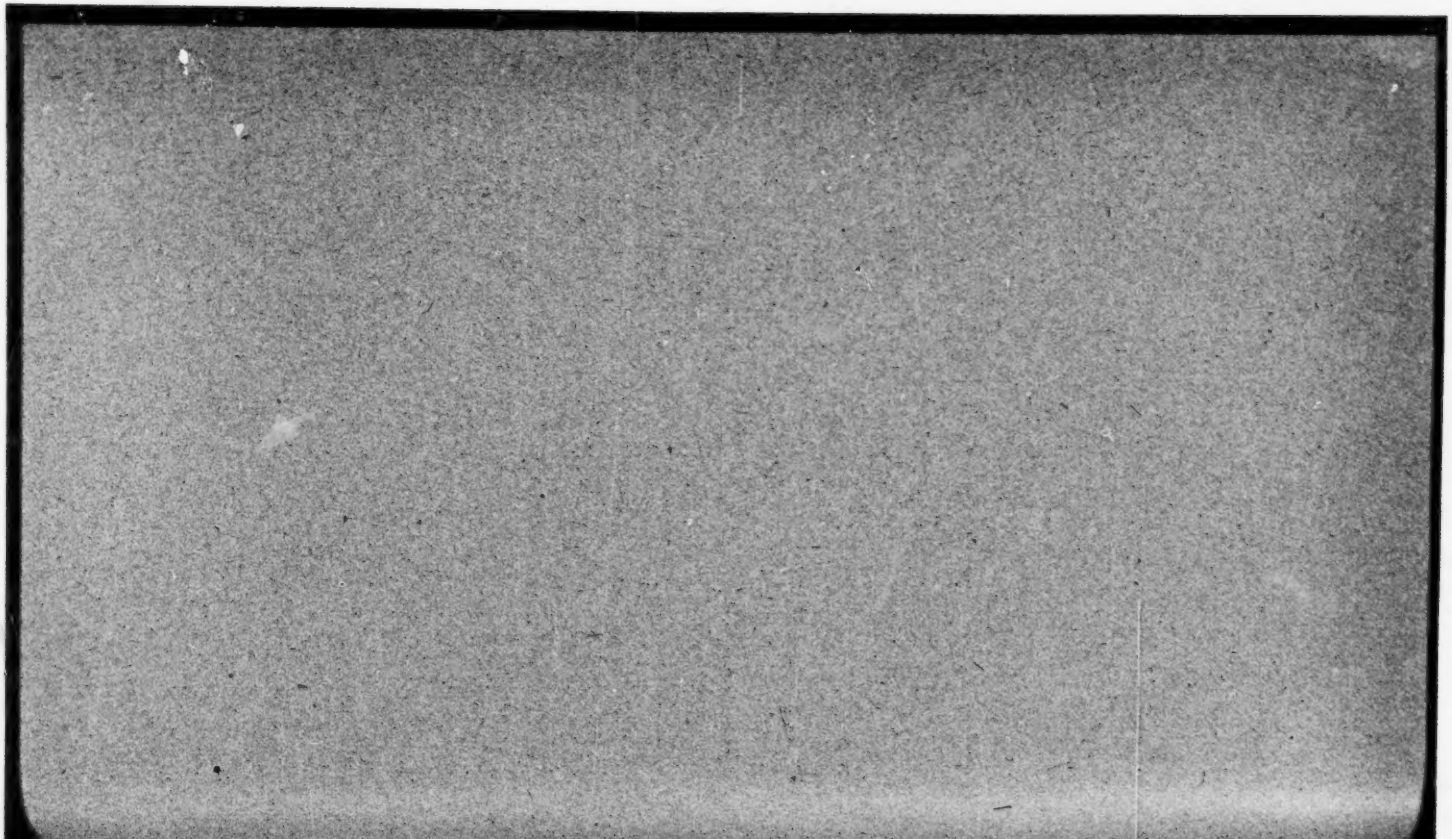
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WALKER, J., after stating the case:—

This in one respect is a case of supreme importance. It involves the right of the State to enforce its criminal laws without interference by the national government or its courts. If the defendant is right in its contention, the authority or separate sovereignty of the State is a myth and not, as we had supposed, a reality. We had taken it to be settled, without leaving room for cavil or controversy, that a Federal Court could not stay the arm of a sovereign State in the execution of its criminal laws. If any exception to this just and necessary rule exists, it must be a very rare one and cannot, for a moment, be considered as applying to this case. But before analysing the ingenious, but specious argument advanced in favor of so astounding a doctrine, as that upon which the defendant relies and showing its utter fallacy, let us consider first, the preliminary questions raised by the defendant. It is but fair to the able, learned and just judge who presided at the trial that we should do so. The defendant complains that it was not given proper time to prepare its defense. In other words, that it was forced hurriedly into the trial and too, with such undue haste as to deprive it of the ability to concert its defense. This is a grave charge to make and if substantiated by the record, it was a violation of the defendant's constitutional rights, we admit, but we are able to state that it is met conclusively and disproved by the facts, as they appear in the case. We are convinced that every reasonable opportunity was afforded the defendant, not only for enter-

ing its pleas and submitting its motions, but for trying the case and defending itself upon the real legal merits. The presiding Judge distinctly announced that the court would sit as long as it was necessary to develop all the facts of the case, even though the term of the court should be extended beyond the time allotted by the statute. This the Judge had the power to do. Revisal, Section 3266. Could the defendant expect to receive a more liberal allowance of time? The other positions taken are equally untenable and we overrule all of the preliminary motions as dilatory and declare that the Judge's ruling thereon did not affect any substantial right of the defendant. We will not refer to the other exceptions, as the view we take of the case renders it unnecessary to do so. The defendant received absolutely fair treatment from the Court, in every respect.

We now proceed to consider the case upon its legal merits. Two questions are raised: 1. Did the proceedings in the United States Circuit Court constitute a defense to the indictment or prevent the grand jury from returning the bill and the State Court from taking cognizance of the same and trying the case? 2. Is any criminal offense charged in the bill of indictment? These are the pivotal and decisive questions in the case. We would not discuss the first question stated, in view of our ruling upon the second, but for the fact that the arguments of counsel and their briefs are largely devoted to its consideration and it is a question of the greatest magnitude and gravity. We think, though, that it has been conclusively settled against the defendant's contention by the rulings of the Court of last resort, having the power and jurisdiction to finally pass upon it. It is so serious a question and so far reaching in its consequences, if the defendant be right in respect to it, that it cannot, perhaps, be too often decided against its present contention if this is to remain a government of the people, by the people and for the people, as originally contemplated by its framers and the rights of the States are to be preserved unimpaired. If it is ever held, as it surely will not be, that the Federal Courts can virtually take charge of our State governments by the process of injunction the separate sovereignty of the States, as distinct from that of the Federal government, will be completely extinguished. It has been said, at least once by the Court of highest authority: "We have already had occasion to remark at this term that 'the people of each State compose a State having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution but it may be not unreasonably said that the preservation of the States and the maintenance of their government, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the

National Government. The Constitution in all its provisions, looks to an indestructible Union, composed of indestructible States." Texas vs. White, 7 Wallace, p. 725; Lane vs. Oregon, 7 Wall. 71. And this was so said since the thirteenth and fourteenth amendments to the Constitution of the United States were ratified. Can this possibly be so, if the defendant's contention as to the effect of the equity proceedings in the Federal Courts, is the correct one. The trend of the argument they now make was clearly seen at once by the Supreme Court of the United States, and they paused to examine it and refused finally to accept it as based upon the correct theory of our government. If we adopt it as sound and carry it to its logical result, it would destroy the proper functions of the State. We will first refer to the latest exposition of the Constitution in this respect and quote from the most recent case upon the subject, decided in 1906, at the last term of the Supreme Court of the United States (Urquhart vs. Brown, 205 U. S. 179, opinion by Justice Harlan): "It is the settled doctrine of this Court that although the Circuit Court of the United States, and the several justices and judges thereof have authority, under existing statutes, to discharge, upon *habeas corpus* one held in custody by State authority in violation of the Constitution or of any treaty or law of the United States, the court, justice or judge has a discretion as to the time and mode in which the power so conferred shall be exerted; and that in view of the relations existing under our present government, between the judicial tribunals of the Union and of the several States, a Federal Court or a Federal Judge will not ordinarily interfere by *habeas corpus* with the regular course of procedure under state authority, but will leave the applicant for the writ of *habeas corpus* to exhaust the remedies afforded by the State for determining whether he is illegally restrained of his liberty. After the highest court of the State, competent under the State law to dispose of the matter, has finally acted, the case can be brought to this court for re-examination. The exceptional cases in which a Federal Court or Judge may sometimes appropriately interfere by *habeas corpus* in advance of final action by the authorities of the State, are those of great urgency that require to be promptly disposed of, such, for instance, as cases "involving the authority and operations of the General Government, or the obligations of this country to, or its relations with foreign nations. The present case is not within any of the exceptions recognized in our former decisions. If the applicant felt that the decision, upon *habeas corpus*, in the Supreme Court of the State was in violation of his rights, under the Constitution or laws of the United States, he could have brought the case by writ of error directly from that court to this court." The same court, in Reid vs. Jones, 187 U. S. 153, said that one convicted for an alleged violation of the criminal statutes of a State, and who insists that he is held in violations of the Constitution of the United States, "must ordinarily first take his case to the highest court of the State, in which

the judgment could be reviewed, and thence bring it, if unsuccessful there, to this court by writ of error; that only in certain exceptional cases, of which the present is not one, will a Circuit Court of the United States, or this court upon appeal from a Circuit Court, intervene by writ of *habeas corpus* in advance of the final action by the highest court of the State." So in Drury vs. Lewis, 200 U. S. 1, it was held that in case of the custody by state authorities of one charged with crime, the settled and proper procedure is for a Circuit Court of the United State not to interfere by *habeas corpus*, "unless in cases of peculiar urgency, and that instead of discharging they will leave the prisoner to be dealt with by the courts of the State; that after a final determination of the case by the State Court, the Federal Courts will even then generally leave the petitioner to his remedy by writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal Courts by which a person under an indictment in a State Court and subject to its laws may, by the decision of a single judge of the Federal Court, upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom." It is true, and we will give the defendant the full benefit of this concession, that in Urquhart vs. Brown, supra, the court was considering a question, which arose upon a petition for the writ of habeas corpus, but it is not so much the particular form of the controversy, as the principle involved in it that controls as a precedent. The point intended to be decided was that full play should be given to the procedure of the State Courts in the prosecution of its criminals, provided the latter have the right of appeal to the courts of last resort in the State, to the judgments of which a writ of error will lie from the Supreme Court of the United States to review the judgment of the State Court, when any question as to an invasion of the Constitutional rights of the defendant may be presented. Instead, therefore, of pleading the proceedings in the Federal Court, the defendant should have set up its defense upon the merits in the State Court and have brought any unfavorable or adverse rulings of the court below here for review, and if it had been deprived of any constitutional right or guaranty, we would have corrected the error. If we should have decided against the defendant's contention, for example, that its property was about to be confiscated and its constitutional rights denied, it still would have had the remedy by writ of error to review the judgment of this court, that is, if Urquhart vs. Brown states the correct principle and will continue to stand as a precedent, and we think, without doubt, that it will.

But there is a more serious and conclusive answer to the defendant's contention. It is stated with great clearness and force in the briefs of counsel for the State, where the true doctrine is ably and learnedly presented. The question of separate State sovereignty may not directly and necessarily be involved, but it is incidentally.

Can a judge of the Circuit Court of the United States, stay proceedings by the State in the prosecution of its criminals? This is not too broad a statement of the proposition upon the affirmative of which the learned counsel for the defendant rest their case. Let us see what this court, and the Supreme Court of the United States whose decisions we must respect and obey, have said upon this subject. It should require no labored argument to demonstrate the fallacy of the defendant's position. The question is merely what has been decided, for the identical matter has frequently been considered and determined by this court and by the Supreme Court of the United States. There can now be no doubt, as to how this Court has ruled upon it, and that ruling is in perfect harmony as we think, with the determination of the highest court. If anything, the latter has been more pronounced in denying to the Federal Courts the jurisdiction now asserted to reside in them. The question was fully considered by this court in Paul vs. Washington, 134 N. C. at p. 380, and, without quoting liberally from the opinion, we will extract therefrom the general principle established. It is there substantially said that there are two objections to the plaintiff's right to maintain this action, first, the courts cannot enjoin the enforcement of the criminal law or of municipal ordinances imposing fines or penalties. In regard to the first objection, we must bear in mind that if the court should issue an injunction against the institution of a criminal prosecution, it would not only interfere with the due administration of the criminal law, which is of the first importance in any well-ordered system of government, but it would have to restrain action by the State in whose soverign name and capacity all criminal cases are commenced and prosecuted, and the State is not even a party to the action and her rights cannot be prejudiced without notice and a hearing, even of we could entertain for a moment, with any seriousness, the proposition that a court of equity can interfere by injunction with the administration of the criminal law. The violation of a town ordinance is made by our statute a misdemeanor. Code, Section 3820. If it is contended that the ordinance imposes a penalty for each violation of it, and that a court of equity will interfere on behalf of the plaintiff to prevent vexatious litigation and a multiplicity of suits, one answer, and a conclusive one, is that a court of equity will never assume jurisdiction in such a case until the rights of the complaining party or, in this particular case, the validity of the ordinance has been first determined in an action at law. In Wallace vs. Society, 67 N. Y., 28, the general rule is stated to be that a court of equity will not restrain a prosecution at law when the question is the same at law and in equity. An exception exists where an injunction is necessary to protect a defendant from oppressive and vexatious litigation. But the court acts in such cases by granting an injunction only after the controverted right has been determined in favor of the defendant in a previous action. On this ground the Chancellor in West vs. Mayor, 10 page

539, dissolved a temporary injunction restraining the defendant from prosecuting suits against the complainant for violation of a municipal corporation ordinance claimed to be invalid. The unconstitutionality of the Act of 1872, he said, would be a perfect defense to a prosecution for the penalties given by it, and the question as to the validity of the act has not been determined. It would doubtless be convenient for the plaintiff to have the judgment of the court upon the constitutionality of the act before subjecting himself to liability for accumulated penalties. But this is not ground for equitable interference, and to make it a ground of jurisdiction in such cases would, in the general result, encourage rather than restrain litigation. The question as to the validity of a corporation ordinance does not properly belong to the court for decision, where the complainants, as in the case presented have a perfect defense at law if the ordinances are invalid, or if they do not render the complainants, or those in their employ, liable for the penalties. And it would be an usurpation of jurisdiction by the court, if it should draw to itself the settlement of such questions when their decision was not necessary in the discharge of the legitimate duties of the court. The court would not grant an injunction to protect him against the multiplicity of suits until his right to such protection had been established by a successful defense at law in some of the suits. We find the rule stated in the 16 Am. & Eng. Enc. of Law, (2 Ed.) at p. 370, as follows: " It is a well-settled rule, both in England and America, that a court of equity has no jurisdiction to interfere by injunction to restrain a criminal prosecution, whether the prosecution be for violation of statutes or for an infraction of municipal ordinances. The rule applies whether the prosecution is by indictment or by summary process, and to the prosecutions which are merely threatened or anticipated, as well as those which have already been commenced. So it is not within the power of the parties to waive the question relating to the jurisdiction of the court and to compel it to try the cause. If the prosecution is under an ordinance, no ground for enjoining it is constituted by the fact that the ordinance is void or that the party seeking the injunction has not committed a violation of the ordinance, or that the complainant in the prosecution under the ordinance states no cause of action." We have no case, however, says the court in Burwell vs. Craig, 30 Ala. 138, "where chancery has restrained a simple trespass or succession of trespasses on either the person or personal goods. The utmost extension of the principle which has come under our observation embraces only trespasses to realty, where the remedial agency is shown to be necessary to prevent multiplicity of suits or to avert irreparable mischief. The judgment and sentences of the town council, of which the appellant complains, were quasi criminal proceedings. A bill in chancery to restrain a malicious or unfounded prosecution is certainly of novel impression. We have not been able to find any principle or adjudged case which justifies an injunction to stay a prosecution, either criminal or quasi criminal, or to restrain a tres-

pass to the person or personal property. We think such a precedent would be an alarming stretch of equity jurisdiction. In considering this case, simply on the equity of the bill, we have necessarily regarded its averments as true. It is not intended by this to intimate an opinion on the validity or invalidity of the ordinance or of the fines imposed on the appellant; they will be considered when properly presented." And later in Moses vs. Mayor, 52 Ala. 198, it was held by the same court, that courts of equity will not interfere to stay proceedings in criminal matters, or in any case not strictly of a civil nature. They will not grant an injunction to stay proceedings on a mandamus, or an indictment, or an information, or a writ of prohibition. The courts of law have complete jurisdiction to punish the commission of crimes, and can interpose to prevent their commission by imprisoning the offender or binding him to keep the peace. But courts of equity have no jurisdiction over such matters; at least a court of equity cannot entertain a bill on this ground alone. A bill in chancery to restrain a malicious or unfounded prosecution is certainly of the first impression, and there is neither principle nor authority to support it. Municipal authorities, it is said, would be paralyzed in discharging the public duties entrusted to them, if every offender against the ordinances they have proclaimed could by injunction arrest them, or could by multiplying his offenses invoke the interference of a court of equity. The counsel for the appellant sought to withdraw the case presented in the bill from the operation of this general principle and the authorities by which it is supported, upon the ground that the interference of a court of equity is necessary in this case for the prevention of vexatious litigation and of a multiplicity of suits. It could well be said in answer, that the litigation and multiplicity of suits apprehended are criminal in their character and without the jurisdiction of the court. In Hottinger vs. New Orleans, 42 La. Ann., 629, the court refused to exercise its equity jurisdiction to restrain the enforcement of an ordinance penal in its nature upon the ground that "The ordinance was enacted in pursuance of the police power vested in the city, whether rightfully or wrongfully is not to be determined in this suit. It was a police regulation in the interest of public health, with a penalty for its violation. The pecuniary loss in the enforcement of the ordinance cannot therefore be considered in determining the question of jurisdiction. The enforcement of the ordinance is vested by the Constitution and law of the State in the Recorder's Court of the City of New Orleans. If the ordinance is unconstitutional, as alleged, the plaintiff can suffer no injury, as she has her remedy and can urge her defense in the Recorder's Court. Failing there she has her remedy by appeal to this court." See also Devron vs. First Municipality, 4 La. Ann., 11; Beach on Injunction, Sec. 520; Eldridge vs. Hill, 2 Johns Ch. 281; Field vs. Western Springs, 181 Ill. 186; 1 Spelling Inj. & Extr. Rem., Sec. 694; Burch vs. Cavanagh, 12 Abb. Pr. Rep. 410; Wardens vs. Washington, 109 N. C. 21; Scott vs. Smith, 121 N. C. 94; Vickers vs. Durham, 132

N. C. 880; Busbee vs. Lewis, 85 N. C. 332; Busbee vs. Macy, 85 N. C. 329; Pearson vs. Boyden, 86 N. C.. 585. In Cohen vs. Commissioners, 77 N. C. 3, the court held that if the defendants have an unlawful and void ordinance and have arrested and fined the plaintiff, he has a complete remedy at law, by exception and appeal, and cannot resort to the jurisdiction of a court of equity for relief. "We are aware of no principle or precedent for the interposition of a court of equity in such cases." All the cases we have cited were approved by this court in Paul vs. Washington, the opinion, in which the principle was considered and the case relied on were reviewed, having been concurred in by four of the members of the court, as then constituted, the Chief Justice, Justice Douglas, Justice Connor and the writer of this opinion, and becoming thereby the opinion of the court upon that question, which really decided the case (as Justice Douglas well said), without regard to the question as to the validity of the ordinances. In the leading opinion, the correctness of some of the decisions is questioned, but the learned Justice, who spoke for the court, frankly states that while "the writer of this opinion is in sympathy with the argument of the counsel of the appellant, the majority of the court are of the opinion that the law as laid down in the cases above cited is correct in principle and applies to the facts of this case, and to all others in which the attempt may be made to test the validity of a municipal ordinance by injunction." So that the doctrine may be considered as settled in this State against the right of a court exercising equitable jurisdiction to interfere by injunction with other courts in the due course of administering and enforcing the criminal laws of the State. Whether this rule is of universal application or will, in extreme circumstances, admit of exception, when justice would otherwise be defeated, we need not, as the principle thus established is clearly applicable to the facts of this case. If the court of a State will not thus interfere with another court of the same State and arrest by injunction the prosecution of a defendant for a crime, surely it will not recognize the power of a court in another and practically a foreign jurisdiction to do so. We must adhere to our own rulings, which have become settled precedents upon this subject, and hold that the United States Circuit Court had no power to enjoin the prosecution of the defendant in the court below and the proceedings of the court introduced in evidence and on which the defendant relies, can afford it no protection against the indictment or prevent a conviction thereunder.

This places our decision, so far, upon a general principle in the law of injunction which governs in courts of equity. But the same doctrine, to the extent that it affects this case, and as obtaining in the Federal Courts, is fully stated by Justice Gray in Ex parte Sawyer, 124 U. S. 200: "Under the Constitution and the laws of the United States, the distinction between common law and equity, as existing in England, at the time of the separation of the two countries, has been

maintained, although both jurisdictions are vested in the same courts. The office and jurisdiction of a court of equity, unless enlarged by express statute are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity, to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or the executive and administrative department of the Government. Any jurisdiction over criminal matters that the English Court of Chancery ever had, became obselete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of habeas corpus for the discharge of persons unlawfully imprisoned. 2 Hale, P. C. 147; Gee vs. Pritchard, 2 Swanst., 402, 413; 1 Spence, Eq. Jur. 689, 690; Atty. Gen. vs. Utica Ins. Co., 2 John. Ch. 371, 387. From long before the Declaration of Independence it has been settled in England, that a bill to stay criminal proceedings is not within the jurisdiction of the Court of Chancery, whether those proceedings are by indictment or by summary process. Lord Chief Justice Holt, in declining, upon a motion in the Queen's Bench for an attachment against an attorney for professional misconduct, to make it a part of the rule to show cause, that he should not move for an injunction in Chancery in the meantime, said: 'Sure Chancery would not grant an injunction in a criminal matter under examination in this court, and if they did this court would break it and protect any that would proceed in contempt of it.' Holderstaffe vs. Saunders, 6 Mod. 16. Lord Chancellor Hardwicke, while exercising the power of the Court of Chancery, incidental to the disposition of a case pending before it, of restraining a plaintiff, who had by his bill submitted his rights to its determination, from proceeding as to the same matter before another tribunal, either by indictment or by action, asserted in the strongest terms the want of any power or jurisdiction to entertain a bill for an injunction to stay criminal proceedings, saying: 'This court has not originally and strictly any restraining power over criminal prosecutions;' and again, 'This court has no jurisdiction to grant an injunction to stay proceedings on a mandamus; nor to an indictment, nor to an information, nor to a writ of prohibition, that I know of.' Mayor and Corporation of York vs. Pilkinton, 2 Atk., 302 S. C. 9 Mod. 273; Montague vs. Dudman, 2 Ves. Sr. 396. The modern decisions in England by eminent equity judges, concur in holding that a Court of Chancery has no power to restrain criminal proceedings, *unless they are instituted by the party to a suit already pending before it, and to try the same right that is in issue there.* Atty. Gen. vs. Cleaver, 18 Ves. Jr., 211; Turner vs. Turner, 15 Jur. 218; Saull vs. Brown, L. R. 10 Ch. 64; Kerr vs. Preston, L. R. 6 Ch. D., 463. Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same

doctrine. Story Eq. Jur., Sec. 893. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under the statutes of the State or under municipal ordinance," citing many cases to sustain the principle.

There is, perhaps, a more conclusive reason why we should hold that the suit in equity pending in the United States Circuit Court and the restraining process issued therein by the Circuit Judge cannot be of any avail to this defendant, so as to prevent a prosecution against it in a State Court for the commission of a crime. The Circuit Court of the United States had no jurisdiction to entertain a suit to enjoin a State, brought by a citizen of any other State or country, even though it may appear that the law, upon which the prosecution in the State Court is founded, conflicts with the Constitution of the United States and is therefore void. This rule is evolved from the Eleventh Amendment to the Constitution, which provides, as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." It is well known that this provision was inserted in the Constitution as a result of the decision in Chisholm vs. Georgia, 2 Dallas 419, decided in 1793, and it was construed in Osborne vs. Bank, 9 Wheat. 738, in which case the Court said: "That in all cases where jurisdiction depends upon the party, it is the party named in the record. Consequently the Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against the States, is of necessity limited to those suits in which a State is a party on the record." But that narrow interpretation of the Amendment, had long since been rejected by the same court and by many successive decisions it has firmly etablished the principle to be that, if the State is substantially or really a party to the record against whom the suit is directed, she comes within the protection of the amendment. In Ex parte Ayers, 123 U. S. 443, a leading case upon this question, it appeared that Ayers, as Attorney General of the State of Virginia and the Commonwealth Attorneys of the several judicial circuits were authorized, by a legislative act, to bring suit against delinquent tax payers, who had tendered coupons, which had been taken from the bonds of the State, in payment of taxes, the burden of proving the genuineness of the coupons being placed by the act upon the defendants. A suit in equity was brought in the United States Circuit Court to restrain and enjoin the said Ayers from bringing actions under the Act or attempting to enforce its provisions and an injunction was issued from that court according to the prayer of the bill. Ayers refused to obey the writ and was accordingly attached for contempt, whereupon he applied for and obtained a writ of habeas corpus from the Supreme Court of the United States and at the hearing was discharged from custody. With reference to these facts the court, by Justice Matthews, said: "The

question really is whether the Circuit Court had jurisdiction to entertain the suit in which that order was made, because the sole purpose and prayer of the bill was by final degree perpetually to enjoin the defendants from taking any steps in execution of the act of May 12, 1887. The principal contention, on the part of the petitioners, is that the suit nominally against them is, in fact, and in law, a suit against the State of Virginia, whose officers they are, jurisdiction to entertain which is denied by the 11th Amendment to the Constitution, which declares that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.' It must be regarded as the settled doctrine of this court, established by its recent decisions, 'that the question whether a suit is within the prohibition of the 11th Amendment it not always determined by reference to the nominal parties on the record.' Poindexter vs. Greenhow, 114 U. S. 270. This, it is true, is not in harmony with what was said by Chief Justice Marshal in Osborn vs. Bank of U. S., 22 U. S. (9 Wheat.) 738. Accordingly in Cunningham vs. Macon, B. R. R., 139 U. S. 446, it was decided that in those cases, where it is clearly seen upon the record that a State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. The relief so sought is against the defendants, not in their individual, but in their representative capacity, as officers of the State of Virginia. The acts sought to be restrained are the bringing of suits by the State of Virginia in its name and for its own use. If the State had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing that such a suit could be maintained—it would have been subjected to the jurisdiction of the court by a process served upon its Governor and Attorney General, according to the precedents in such cases. If a decree could have been rendered enjoining the State from bringing suit against its tax-payers, it would have operated upon the State only through the officers who by law are required to represent it in bringing such suits, namely, the present defendant, its Attorney General, and the Commonwealth's Attorneys for the several counties. For a breach of such an injunction, these officers would be amenable to the court as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and inprisonment. The nature of the case, as supposed, is identical with that of the case as actually presented in the bill, with the single exception that the State is not named as a defendant. How else can the State be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, attorneys and agents? And if all such officers, attorneys and agents are personally subject to the process of the court, so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual

and real defendant. It is, however, insisted upon in agreement, that it is within the jurisdiction of the Circuit Court of the United States to restrain by injunction officers of the State from executing the provisions of State statutes, void by reason of repugnancy to the Constitution of the United States; that there are many precedents in which that jurisdiction has been exercised under the jurisdiction of this court, and that the present case is covered by their authority."

The court, after reviewing the authorities at length, denied the contention of the complainants and held with the petitioner that the suit was one against the State and the proceedings against him for the alleged contempt in disobeying the order of injunction therein issued, was consequently null and void. Referring again to the suit in equity for an injunction as being one essentially against the State of Virginia in its sovereign capacity, though nominally against its prosecuting officers, the court said: "It is therefore within the prohibition of the 11th Amendment to the Constitution. *By the terms of that provision it is a case to which the judicial power of the United States does not extend.* The Circuit Court was *without jurisdiction* to entertain it. All the proceedings in the exercise of the jurisdiction which it assumed are null and void. The orders forbidding the petitioners to bring the suits, for bringing which they were adjudged in contempt of its authority, it had no power to make. The orders adjudging them in contempt were equally void, and their imprisonment is without authority of law."

The next case in order, which presented the precise question we have here, is Reagan vs. Loan & Trust Company, 154 U. S. 362. It was attempted in that suit, as here, to enjoin the Corporation Commission and other officers of the State of Texas from enforcing a statute authorizing them to prescribe the maximum rate of charges by railroad as carriers. The court laid down certain specific propositions as having been settled by its former adjudications. The great question involved is stated to be, the right of the State to regulate or limit traffic charges and it was held that the legislature has the power to fix rates and the extent of judicial interference is protection against unreasonable rates. The question of the validity of a rate or charge for transportation in respect to passengers or freight, involving as it does the element of reasonableness, both as regards the company and as affecting the public, is eminently one for judicial investigation, requiring the process of law for its determination. Railway Co. vs. Minnesota, 134 U. S. 418. The power thus to regulate the affairs of corporations and, in the case of carriers, to limit their charges for transportation, is not without limit. It is not a power to destroy, and regulation is not the equivalent of confiscation. Under the pretense of prescribing a maximum charge for fares and freights, the State cannot require the carriers to transport persons or property without reward, neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. Stone vs. Loan & Trust Co., 116 U.

S. 307; Dow vs. Beidelman, 125 U. S. 680. It was also held by the court that the undoubted general power of a State to regulate the fares and tolls which may be charged and received by railroad or other carriers can be exercised through the medium of a commission or administrative board created by the State for that purpose and in order to execute the will of the State as expressed by its legislation. Stone vs. Loan & Trust Co., 116 U. S. 307. In that case it was held to be the settled doctrine of the court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce. General statutes regulating the use of railroads in a state, or fixing maximum rates of charges for transportation, when not forbidden by character contracts, do not necessarily deprive the corporation owning or operating a railroad within the State of its property without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, nor take away from the corporation the equal protection of the laws. While the principles thus stated were recognized and affirmed in Reagan vs. Loan & Trust Co., supra, the court distinctly adopts, as a rule equally well established, what is said in Ex parte Ayers, supra. Justice Brewer, delivering the opinion of the court, refers to that decision and classifies the cases in which interference by injunction is and is not permitted; he says: "We are met at the threshold with the objection that this is a suit against the State of Texas, brought by a citizen of another State and therefore, under the 11th Amendment to the Constitution, beyond the jurisdiction of the Federal Court. The question as to when an action against officers of the State is to be treated as an action against the State, has been of late several times carefully considered by this court, especially in the case of Ex parte Ayers, 123 U. S. 433. To secure the manifest purpose of the constitutional exemption guaranteed by the 11th Amendement, requires that it would be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit, it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents and representatives where the State, though not named as such, is nevertheless the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectually operates. It is well settled, that no action can be maintained in any Federal Court by the citizens of one of the States against a State, without its consent, even though the sole object of such suit be to bring the State within the operation of the constitutional provision which provides, 'no State shall pass any law impairing the obligation of contracts.' This immunity of a State from suit is *absolute* and *unqualified* and the constitional provision securing it is not so construed as to place the State within the reach of the

process of the court. Accordingly it is equally well settled that a suit against officers of a State to compel them to do the acts which constitute a performance by it of its contracts is, in effect, a suit against the State itself. In the application of this latter principle two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that different views have been presented. The first class is when the suit is brought against the officer of the State, as representing the State's action and liability, making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State." In the Reagan case, the suit had proceeded to final hearing and decree and a perpetual injunction was granted upon the findings of fact, which showed that the rates were confiscatory and, besides, the legislature did not itself prescribe the maximum of charge for transportation, but left that matter to be determined by the commission. The provisions of the act were not enforcible except by the commission. In this particular, that case and this one are clearly distinguishable. Before proceeding to discuss further the rulings in the Supreme Court of the United States upon this important and far reaching question which now engages perhaps more of the attention and anxious consideration of the public and of the courts of this country than any other, as it should, for it vitally concerns the due and lawful exercise of the powers conferred by the Constitution upon the Federal Government and those reserved respectively to the States or to the people and should be settled definitely and conclusively in order to avoid unfortunate judicial conflicts, we will pause to decide one question involved in this case, which also differentiates it from Reagan vs. Loan & Trust Co. There is nothing in our act which makes its operation depend at all upon anything to be done by the corporation commission, or the Attorney General or his assistant. The said officers last named are required to prosecute in the name of the State any crime committed in violation of the act, but Ex parte Ayers is direct authority that they cannot be reached by an injunction while in the performance of this official duty. Besides, can it be said, with any show of reason, or even with the sanction of plausible argument, that a suit for an injunction directed against the Attorney General in the prosecution of criminal cases, in which the State under our law, and the sovereign under all law, is the plaintiff of record and too the real plaintiff, is not in its very nature and in its natural and necessary effect, a suit against the State? Can it be said, in answer to this suggestion, that the State can proceed against criminals, and yet at the same time, that she can be deprived of all power to do so by her duly constituted law officers, charged with the duty of enforcing the crimi-

nal law? The injunction had just as well be issued against the grand juries or the judges who preside in her courts. The act provides (Public Act of 1907, Ch. 216, Sec. 7), that it shall be in force from and after July 1, 1907, and the provision that the Corporation Commission is required to publish the rates "fixed by this act," on or before June 1, 1907, for the information of the public and the railroads concerned, is directory, and was not intended to stay the operation of the act beyond July 1, 1907, should the commission fail in the performance of that duty, nor in law, by any reasonable construction of the act, does it have any such effect. The maximum rate prescribed by the act was unconditionally effective from and after July 1, 1907, and the act was therefore self-executing. For this reason alone, if for no other, the suit in equity pending in the United States Circuit Court cannot be permitted to affect the proceedings in the court below in this case.

The case of Railway Co. vs. Minnesota, 134 U. S. 418, so much relied on by the defendant's counsel, is also far from being an authority against the ruling we now make. The act construed and held valid in that case, provided that the tariff of rates as made and published by the Railroad Commission should be final and conclusive as to what are equal and reasonable charges and that there should be no judicial inquiry into the matter for the purpose of determining the reasonableness of the rates so prescribed. Quite a different case from this one. We do not say that a judicial inquiry cannot be made in a proper way, but that the State, in the exercise of its sovereign power, cannot be enjoined under the guise of restraining her officers in the performance of a duty which is not required to make the rate act effective. Nor can the state be controlled by the Federal Courts in the execution of her criminal laws. But it may be remarked, in passing, that the opinion of the court in Railway vs. Minnesota, as well as the concurring opinion of Justice Miller, especially cited by the defendant's counsel as controlling this case was met by an exceedingly strong dissent from Justices Bradley, Gray and Lamar, who asserted that what is a reasonable charge is not a judicial question, but is "pre-eminently" a legislative one involving consideration of public policy as well as of remuneration, and that the legislature may itself fix the maximum and thus exclude judicial inquiry or it may merely provide that the rate shall be reasonable, or that reasonable rates shall be determined by a commission or by the common law, when the question of reasonableness is open to judicial investigation. They further asserted that the court in Railway vs. Minnesota, had virtually overruled Munn vs. Illinois, 94 U. S. 113, and the cases afterwards decided and based upon the principle of that case. When we consider the real nature of a corporation, the source of its creation, and the tenure, if we may so speak, by which it exercises its privileges and franchises, and indeed holds its property, the reserved power of the State with respect to them and many other facts and reasons that can easily be adduced,

it may well be a question whether the advantage and strength of the argument in that case was not all with the dissenting justices. But accepting the principle announced by the majority of the court, as the law with us, and we so accept it, it does not bear upon this case and should not control our decision. We also think the many other cases on which the defendant's counsel rely are equally inapplicable to the facts of this case. There is no evidence in this case, and of course no adjudication binding upon us, that the rate prescribed by the Act of 1907 is confiscatory nor do we understand the defendant to rely upon the record of the proceedings in the Federal Court as establishing that fact, (for it would not be evidence for that purpose) but merely as showing that complete and exclusive jurisdiction of the entire matter was in that court by virtue of the suit therein pending and that its order of injunction extends so far, in its broad sweep, as to stop the State in the ordinary enforcement of its criminal laws. This would be a very alarming doctrine, if true, but fortunately it is not.

Recurring to that part of our opinion where we digressed, in order to consider the nature of the Act of 1907, and to determine when it became effective and to distinguish from the case at bar certain cases decided by the Supreme Court of the United States, which it is contended by the defendent are decisively in its favor, we will refer to one other case recently decided by that court.

In Fitts vs. McGhee, 172 U. S. 416, it was attempted to enjoin the Attorney General of Alabama, and the Solicitor of one of her judicial circuits from prosecuting suits for penalties provided for violations of an act fixing the maximum tolls to be charged by a bridge company for the use of its bridge across the Tennessee River. The Supreme Court denied the jurisdiction of the Circuit Court of the United States and the case, as we understand, established three propositions, as follows: "1. A suit to restrain officers of a State from taking any steps by means of judicial proceedings, in execution of a State statute to which they do not hold any special relation, is really a suit against the State within the prohibition of the 11th Amendment to the Federal Constitution. 2. The Circuit Court of the United States sitting in equity is without jurisdiction to enjoin the institution or prosecution of criminal proceedings commenced in a State Court. 3. The power of the Federal Courts to interfere by habeas corpus with the trial of indictments found in State courts, on the ground that the State statutes under which the indictments are found are repugnant to the Federal Constitution, laws or treaties, will not be exercised, in the first instance, unless there are exceptional or extraordinary circumstances to require it, but the party will be left to make his defense in the State Court." In the course of the opinion Justice Harlan says: "Let them appear to the indictment and defend themselves upon the ground that the State statute is repugnant to the Constitution of the United States. The State Court is competent to determine the question thus raised and is under a duty to

enforce the mandates of the supreme law of the land. Robb vs. Connolly, 111 U. S. 624. And if the question is determined adversely to the defendants in the highest court of the State, in which the decision could be had, the judgment may be re-examined by this court upon writ of error. That the defendants may be frequently indicted, constitutes no reason why a Federal Court of equity should assume to interfere with the ordinary course of criminal procedure in a State Court." The court then proceeds to distinguish the cases cited in the defendant's brief filed in this court, upon the ground that the State officer in each of them was committing, or about to commit, some specific act or trespass to the injury of the complainant's rights. Other equally satisfactory reasons could be assigned why the suit in equity now pending in the Circuit Court of the United States, should not be allowed to defeat the prosecution of the indictment in the court below, but we do not deem it necessary to consider or even state them, as what we have already said upon this point is sufficient to convince us that the Federal Court was and is without jurisdiction to stay the institution of criminal proceedings in a State Court, and we would affirm the judgment in this case, if it did not appear that no criminal offense is charged in the bill of indictment. We will now consider that question. The State contends that the first section of the Act of 1907, contains a distinct prohibition against common carriers of passengers charging more than two and one quarter cents per mile and that while a penalty is imposed for a violation of that section, it is done by a subsequent section of the Act and where this occurs, although the offense may be a new one, or one not existing at the common law, the State can proceed by indictment to punish a violation of the first section, and the party specially aggrieved thereby may also at the same time recover the penalty, it being conceded as we understand, that if the penalty had been imposed in the first section where the prohibition is found, this would not be so, and an indictment would not lie. If there is any respectable authority for such a position, and we do not think there is, it is not only inherently unsound, but exceedingly refined and technical, and Mr. Bishop says that it is not only refined but is contrary to all reason. It is a distinction without a difference in law or in fact. The act prohibits a charge above two and a quarter cents and then provides in a subsequent section (4), that any railroad company violating its provisions shall be liable to a penalty of $500 for each violation, recoverable by the person aggrieved in a civil action, and any agent of the company violating the act shall be guilty of a misdemeanor. How could the legislature more clearly or convincingly have expressed its intention to discriminate, as to the consequences, between a violation of the railroad company and a similar violation by its agent, and what practical difference can it make whether the penal provisions is in the first or the fourth section of the act? Does not the latter section distinctly refer to the

former, the same as if it had been incorporated with it?' The rule of construction relied on by the State seems to have arisen from a total misconception of the English authorities, and a rank dictum of Justice Ashurst in Rex vs. Harris, 4 T. R. 205, with no authority cited to support it. Lord Kenyon, who wrote the leading opinion in the same case, expressly stated that the offense created by the Act of Parliament (26 Geo. 2 Ch. 6, Sec. 1), namely disobedience of an order of the King in council, was in itself an offense at common law and Lord Ashurst afterwards, in his opinion, explains, if he does not destroy his dictum by confining it to the special facts of that case. The law is thus stated by Bishop in his work on Statutory Crimes (1873) Sec. 250: "The doctrine is that, where an offense is created by statute, and the same statute prescribes the penalty, or the mode of procedure, or anything else of the sort, only that which the statute prescribes can be followed. But where the offense is at common law, statutory provisions not directly repugnant to the common law are cumulative, and either law may be followed. And where a statute forbids a thing before lawful, but provides no penalty, the indictment for the offense is at common law. So, where it prescribes no mode of prosecution, the common law indictment lies." He cites numerous cases in the note to that section, among them several English cases, which sustain his statement of the rule and under it the case of Rex vs. Harris, supra, was correctly decided, because the penalty imposed by the statute construed in that case was for an offense which previously existed at the common law. The authorities cited by the learned counsel for the State, can be easily reconciled with the principle as stated by Mr. Bishop, if they are read with reference to the particular facts being considered in them. Reg. vs. Buchanan, 8 Ad. & El. (55 E. C. L.) 883, was a case of like kind with Rex vs. Harris, as the offense of an attorney practicing without having been duly admitted or called to the bar, or enrolled, was made a contempt of court which, we know, and it is so held in the opinion of Lord Denman, was also a misdemeanor at common law. It is intimated by the Chief Justice that if a penalty has been imposed, instead of the remedy by attachment for contempt given, the result in that case would have been different. Section 237 cited from 1 Bishop on Cr. Law is, in our opinion, inferentially against the State's contention. We reproduce it here: "It is obvious that to prohibit a thing by a statute is to bring it within the jurisdiction of the tribunals. Whence we see, carrying in our minds what is stated in the last section, how and why, as explained in another volume, when a statute forbids a thing affecting the public, *but is silent as to any penalty*, the doing of it is indictable at the common law." (Italics ours). In Rex vs. Wright, 1 Burr. 542, it was held that "indictment lies not upon an act of Parliament, which creates a new offense and prescribes a particular remedy." Lord Mansfield said in that case: "I always took it, that where

new created offenses are only prohibited by the *general prohibitory* clause of an act of Parliament, an indictment will lie; but there is a prohibitory *particular clause*, specifying only *particular remedies*, there such *particular remedy* must be *pursued*. For otherwise the defendant would be liable to a double prosecution; one upon the general prohibition, and the other upon the particular specific remedy." And when afterwards informed that the counsel for the crown "gave up the matter," replied. "I do not wonder at all at it; I thought he would do so. I have looked into it and there is nothing in it. That case of Crofton (where the contrary is supposed to have been decided) has been *denied* many times." In Rex vs. Robinson, 2 Burr. 799, 803, the great Chief Justice (Lord Mansfield) said: "But where the offense was antecedently punishable by a common law proceeding, and a statute prescribes a particular remedy by a summary proceeding there, *either* method may be pursued, and the prosecutor is at liberty to proceed either at common law, or in the method prescribed by the statute because there the sanction is cumulative, and does *not exclude* the common law punishment. 1. Salk. 45. Stephens vs. Watson was a resolution upon these principles; in that case, keeping an alehouse without license was held to be *not* indictable, because it was *no* offense at common law; and the statute which makes it an offense, has made it punishable in *another manner*. "And again in the same case when discussing the same point he sums up, at p. 805 as follows: "The true rule of distinction seems to be that, where the offense intended to be guarded against by a statute, was *punishable before* the making of such a statute prescribing a particular method of punishing it, there such particular remedy is *cumulative* and does not take away the former remedy; but where the statute only enacts 'That the doing any *act not punishable before*, shall for the future be punishable in such and and such a *particular* manner,' there it is necessary that such *particular* method, by such act prescribed, must be *specifically pursued;* and not the common law method of an *indictment*." In Castle's Case, 2 Cro. Jac. 644, it was resolved that where a statute imposes a penalty for doing a thing, which was no offense before, and provides how it shall be recovered, it shall be punished by that means, and not by indictment. The offense being new, the particular mode of punishment must be pursued. The generally accepted rule upon this subject is thus stated in McClain's Cr. Law, Sec. 8: "If the act prohibited had been previously an indictable offense it will be presumed that the civil penalty therefor is cumulative; but when the act creates a new offense and makes that unlawful which was lawful before, and prescribes a particular penalty and mode of procedure, that penalty alone can be enforced." See also 16 Enc. of Pl. & Pr. 239; Reg. vs. Wigg, 2 Salk. 460, Com. vs. Bridge Co., 68 Mass. 67; State vs. Maze, 25 Tenn. 17; People vs. Hislop, 77 N. Y. 331 Com. vs. Evan, 13 Serg. & R. 426; McElhiney vs. Com. 22 Pa. St. 365; Hellings vs. Com., 5 Rawle 63; Journey

vs. State, 1 Mo. 428; Com. vs. Howes, 32 Mass. 231; State vs. Sinnet, 15 Neb. 472; U. S. vs. Laeskl, 29 Fed. Rep. 699; Pentlarge vs. Kirby, 19 Fed. Rep. 501; Carle vs. People, 12 Ill. 285; Reed vs. Railroad, 33 Cal. 212; State vs. Crocroft, 2 Ibid. 233; Battleboro vs. Wait, 44 Vt. 459; Moses vs. Sprague, R. I. 541; Confrey vs. Stark, 75 Ill. 187. But the case of State vs. Snuggs, 85 N. C. 542, is exactly in point, for the act of issuing a marriage license to persons under eighteen years of age was forbidden in one section and the penalty was imposed in another section. Ruffin, J., for the court, said: "The statute not only creates the offense but fixes the penalty that attaches to it, and prescribes the method of enforcing it, and the rule of law is that wherever a statute does this, no other remedy exists than the one expressly given, and no other method of enforcement can be pursued than the one prescribed. The mention of a particular mode of proceeding excludes that by indictment, and no other penalty than the denounced can be inflicted. 1 Russell on Crimes, 49; State vs. Loftin, 2 Dev. & Bat., 31." It was held, therefore, that no criminal offense was charged in the indictment and it was quashed. In this connection, Ruffin, J., at p. 544, further said: "We are convinced that His Honor's ruling in quashing the indictment is correct, in view of the fact that the statute *creates* the offense, affixes the penalty, and prescribes the mode of proceeding—the mention of the *particular* method operating to the exclusion of every other." (Italics ours.) In Loftin's case, 19 N. C. 31, which is relied on by the court in Snuggs' case, and which states the same rule, Judge Gaston, who wrote the opinion, cites with approval Castle's case, Cro. Jac. 64, 1 Salk. 45, and Rex vs. Robinson, 2 Burr. 803, which we have already mentioned as English cases sustaining the rule. The case of State vs. Snuggs was expressly approved in State vs. Bloodworth, 94 N. C. 918 and, by the strongest implication, in State vs. Parker, 91 N. C. 650, and State vs. Addington, 121 N. C. 538. There is no sound reason for, and, not intending to use too harsh a term, no practical sense in the distinction between a statute which prohibits an act to be done and then, in the same section, denounces the penalty and one in which the penalty is imposed in a separate section, and especially can no such rule be applicable to the statute we are now construing, as the legislative intent is unmistakably expressed, that for disobedience to the provision of Section 1, the carrier shall pay a penalty only to the party aggrieved, and the agent shall be liable to indictment for a misdemeanor, and counsel for the State, on the argument, answered a question from the court in such a way as clearly recognized this to be the intention. Being asked why the legislature had discriminated against the agent, the reply was (and undoubtedly the correct one), it was supposed that the penalty could not be recovered from the agent while it could be from the carrier.

But it is suggested that the defendant, while not liable as a principal, for doing the act itself, is liable criminally as accessory before

the fact, having counselled, aided and abetted the agent in the sale of the ticket, and as all accessories in misdemeanors are regarded as principals, the defendant thereby became a principal under the law. This is a very strange, and to our minds, a very illogical argument and a palpable non sequitur. The judge, who presided at the trial, evidently did not take this view of the case, for he charged the jury upon no such theory. He plainly thought that the sale of the ticket by the agent made the defendant, his employee, liable per se. In other words, that the act of the agent was the act of the principal under the first section of the act and the doctrine of State vs. Kittelle, 110 N. C. 560. But he failed, inadvertently, to take into account the fact that in the case cited (if it can be considered as stating a correct rule), there was no special provision in the statute, under which Kittelle was indicted, for penalizing the employer, as there is in the Act of 1907, which brings this case directly within the decision in State vs. Snuggs and takes it out of the principle decided in State vs. Kittelle. In the latter case, Kittelle was held liable for the act of his employee because he held the license to sell liquor, and further upon the principle applying to the law of contracts and civil torts, that the principle must answer for the acts of his agent (Respondeat Superior), and that he who does an act through the medium of another party is in law considered as doing it himself. (Qui facit per alium, facit per se). The difference between that case and this one is manifest. Besides, the defendant here is a corporation and can act only by its agents. It has no personality or individuality. The principal can do no more by his agent than if he were personally present and acting. The very thing the agent does, whether he be the agent of a corporation or of an individual, marks the extent of the principal's liability. It cannot go beyond the limits of the agent's act. So in this case, when the agent sold the ticket, even under the order of his principal, the defendant, he did the very thing and the *only* thing prohibited by the Act of 1907, Ch. 216, for which he and his principal are made liable by the Act, he to an indictment for misdemeanor and the principal to a penalty. How could the defendant, a mere legal entity, commit the act prohibited by the statute except by its agent? The statute itself, by its very terms, recognizes this fact, that the corporation can act only by its agent, and therefore that the act of its agent is what renders it liable for the penalty. If a corporation can act only through its agent, and thereby becomes, in law, completely identified with its agent, how can it be an accessory to his act, for in such case it must be accessory to its own act, which is a legal absurdity.

It appears from the Act of 1907, that a penalty is denounced against the carrier, and the agent is made criminally liable for the same offense, namely, disobedience of the prohibition in Section 1, against charging more than two and a quarter cents per mile. The legislature, by an elementary rule of statutory construction, is pre-

sumed to have had the law, as settled by State vs. Snuggs, in mind, when it passed the Act of 1907, and that act will be construed according to the rule as therein stated. The legislature is presumed to know the existing law and to legislate with reference to it. The case of Kittelle, and cases of its class, do not apply, as no special punishment was provided for the principal in the law upon which they were decided, while in the Act of 1907 there is a special remedy against the principal. The doctrine of accessories does not apply, as we have shown, and the corporation would, even under that doctrine, commit the identical act for which the penalty is provided and, besides, no one can be an accessory to his own act, as already explained. The legislative intent is so clear and unmistakable that it would seem to be impossible to misunderstand what is so plainly expressed.

Much is said in the briefs about the equity of the suit in the Federal Court and the Complainant's right to an injunction. We would not agree with the learned Judge, who issued the interlocutory injunction, if that matter were strictly before us and we were required to pass upon it, for we do not think there was a sufficient disclosure of the facts, which are necessarily within the knowledge of the complainant in that suit (the defendant in this indictment) to entitle it to the favorable consideration of a chancellor. It is a very serious matter to suspend the operation of a public statute and to postpone the execution of the people's will at the instance of a private suitor, even upon the allegation that his property is about to be confiscated, or some other constitutional right is about to be impaired, and it should not be done except upon a *full* disclosure of all the facts in the complainant's possession, and upon the clearest showing that the threatened injury will at least probably result. "It is a cardinal principle of equity jurisprudence that a preliminary injunction shall not issue in a doubtful case. Unless the court be convinced with reasonable certainty that the complainant must succeed at the final hearing, the writ should be denied." Hall Signal Co. vs. Railway Signal Co., 153 Fed Rep. (C. C. A.) 907; City Signal Co. vs. Railroad Co., 75 Fed. Rep. 1004. It has been held by at least one Federal Court, when considering the identical question presented in this case, that it would be impossible to decide whether the reduction of a rate will be confiscatory in the absence of an actual test of the same. The court held that whether it would be so or not was speculative and mere guess work, and that the testimony of an ordinary business man, expressing his opinion, or even of railway experts also giving opinions and illustrating them by the use of many figures based upon past experience, was not satisfactory and did not relieve the doubt and uncertainty sufficiently to warrant the issuing of a preliminary injunction. Railway Co. vs. Hadley, 155 Fed. Rep. at p. 225. In this case the reports of the defendant to the corporation commission do not tend to diminish the uncertainty as to what effect the lower rate will have upon the defendant's income, but rather to increase it.

It would be natural to suppose that a lower rate would cause increased travel and, while additional facilities must be provided for it, the relative increase of the cost of the latter and of the renumeration from the natural increase in passenger traffic cannot be determined with any degree of certainty except by actual trial. We have carefully examined the opinion of the Federal Court in this matter and have not been convinced thereby that we have erroneously decided any of the questions growing out of the equity suit. We refer especially to Ex parte Wood, 155 Fed. Rep. 190, in which the petitioner, a ticket agent of the defendant, who applied for the writ of habeas corpus, was granted the writ and then discharged for a violation of the Act of 1907. The decision is based upon the ground that the sale of tickets was "an act done in pursance of an order, process or decree of a court of the United States or judge thereof," under Rev. Statutes of U. S. Section 753 (U. S. Comp. Statutes, p. 592). This is giving a very broad and liberal construction to that section. Can it mean that the criminal laws of a State shall be suspended by the order of a single federal judge, even if they conflict with it? We cannot give our assent to such a construction, and we are quite sure that our Chief Justice did not intend to sanction it in the quotation made by the learned Circuit Judge in Ex parte Wood from State vs. Boone, 132 N. C. 1108. He was speaking there of a duty enjoined by a valid federal law not being punishable by the State as a crime, and not merely of one imposed by the order of a federal judge. But it is unnecessary to continue this comment any further, as the defendants in the equity suit must avail themselves of any erroneous ruling therein by exception and an appeal from the decree entered in that suit at the final hearing. We do not think, upon the question of the jurisdiction of the Federal Court, that Mfg. Co. vs. Los Angeles, 189 U. S. 207, and Dobbins vs. Los Angeles, 195 U. S. 241, which are cited in Ex parte Wood, bear any analogy to the equity suit wherein the order of injunction was issued, under which Wood is alleged to have been acting when he sold the tickets. In the former case (189 U. S. 207), Justice Brown clearly distinguishes the two classes of cases from each other. The State in this proceeding is enforcing her criminal laws.

It must not be understood by what we have said, that we are not criticizing the decision of the Federal Court, but merely examining the grounds and reasons upon which it rests, with a view of determining whether it should have any influence upon our conclusion in this case. We always discuss respectfully the decision of other courts, however much we may disagree with them, and it is our pleasure, as well as our duty to do so, for any other course would be most unseemly.

The question here is not whether one who advises or commends a criminal act to be committed is himself liable, nor whether that admitted principle applies to corporations, for it clearly does; nor is it whether a railroad company is liable civilly for any damages caused by

the unlawful act of its agent, which he has been required by the company to do, or which it has afterwards ratified. All these principles are elementary, but they have no application to the facts in this case, no more than the right of a creditor to enforce the payment of a debt legally due to him by his debtor, could have. The question, and the only one is, whether the legislature has created a new offense and prescribed a specific punishment or penalty for its commission, and, if so, whether this does not exclude the common law remedy by indictment. We cannot pervert the meaning of plain words and change the intent of the legislature because able lawyers may have been members of that body. If that be so, more is the reason why we should construe the statute according to its clearly expressed meaning. What the executive shall do, if any emergency has arisen requiring him to act, is not a question in this case, and we have, and should have no suggestion to make as to his duty in the premises. We are assured that, in the independent exercise of his high official functions, he will act wisely and well and for the best interests of the people.

Since this opinion was prepared, we have found that the Supreme Court of the United States in Yates vs. Bank, 206 U. S. 158. has decided the very question presented in this case, precisely as we have in regard to the right to indict. It says: "The civil liability of national bank directors, then, in respect to the making and publishing of the official reports of the condition of the bank, a duty solely enjoined by the statute, being governed by the national bank act, it is self-evident that the rule expressed by the statute is exclusive, because of the elementary principle that where a statute creates a duty and prescribes a penalty for non-performance the rule prescribed in the statute is the exclusive test of liability," citing Bank vs. Dearing, 91 U. S. 35. So in a note to Leathers vs. Tobacco Co. (a case decided by this court), which is reported and annotated in 9 L. R. A. at p. 349, it is said at page 392: "If a statute imposes a new duty, and creates a new right, and at the same time provides a specific remedy to punish the neglect of the one and to secure the other, that remedy is exclusive, and no other action lies for an infraction of the statute. But, if a statute recognizing an old right imposes another duty in respect of it, and provides a method of enforcing it, the remedy provided in the statute is cumulative, and existing rights of action are unaffected unless expressly taken away." These authorities treat the principle as elementary and undeniable.

Upon a review of the whole case, our opinion is that the Federal Court had no jurisdiction to enjoin the finding and prosecution of this indictment, and that the suit in that court is virtually one against the State within the meaning and intent of the Eleventh Amendment to the Constitution of the United States. But it is clear that as no criminal offense is alleged in the indictment, there is nothing for us to do but to arrest the judgment.

JUDGMENT ARRESTED.

A true copy:

HUNTER, SHERIFF OF BUNCOMBE COUNTY, NORTH CAROLINA, *v.* WOOD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

No. 474. Argued December 18, 19, 1907.—Decided March 23, 1908.

Where the Circuit Court of the United States has, in an action within its jurisdiction, issued an interlocutory injunction against the enforcement of a state railroad rate statute, and in such order directed the conditions under which tickets shall be sold at rates higher than those prescribed under the state statute, a ticket agent who sells tickets in conformity with such conditions, and who is proceeded against, convicted, and sentenced therefor by the state authorities, is in custody for an act done pursuant to an order, process or decree of a court or judge of the United States within the meaning of § 753, Rev. Stat., and may apply for a writ of *habeas corpus* to the United States circuit judge who has the power and right under such section to discharge him.

Ex parte Young, *ante*, p. 123, followed as to the jurisdiction of the Circuit Court of the United States of such an action.

JAMES H. Wood, the appellee, being one of the ticket agents of the Southern Railway Company, was, on July 17, 1907, charged in the police justice's court of the city of Asheville, in the county of Buncombe, in the State of North Carolina, with unlawfully and willfully overcharging one T. J. Harmon for a railroad ticket from Asheville, North Carolina, to Canton, North Carolina, in violation of the state law. He was arrested and brought before the court, and on the trial, July 18, 1907, was convicted and sentenced by the court to imprisonment in the county jail of Buncombe county for the term of thirty days, to be worked out on the public roads of that county for that time, and to pay all costs.

The appellee applied to the United States circuit judge in the Western District of North Carolina for a writ of *habeas corpus* to be directed to Hunter, appellant, as sheriff of Buncombe

county, to inquire into the cause of his detention and to obtain his discharge. The writ was issued and, after a hearing, the Circuit Judge discharged the appellee from imprisonment, and directed that a copy of the order of the discharge should be certified to the police justice's court of the city of Asheville and to the sheriff of Buncombe county, in whose custody the petitioner then was. *Ex parte Wood*, 155 Fed. Rep. 190.

It appeared that prior to the passage, in 1907, of the acts of the North Carolina legislature in relation to passenger and freight rates on railroads within the State, the Southern Railway Company were charging the rates then allowed by law. After the passage of the acts above mentioned, which greatly reduced the rates of compensation for the transportation of both passengers and freight, the Southern Railway Company commenced a suit in equity in the Circuit Court of the United States for the Western District of North Carolina against the corporation commission and the attorney general and assistant attorney general of the State, to enjoin the taking of any proceedings or the commencement of any suits or actions to enforce the acts in question or to recover penalties for the disobedience of such acts by the company. The bill alleged that the acts were unconstitutional, and that if the rates were enforced the result would be to prevent the company earning anything upon its investment, and deprive it of its property without due process of law, and deny it the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States. The bill also averred that a duty rested upon the corporation commission and the attorney general and assistant attorney general to take such proceedings as they might deem expedient for the enforcement of the acts, and that the corporation commission would, for the purpose of putting the acts into effect, do those things which it was provided should be done, and in case of continuous refusal on the part of the company to charge only the rate specified the attorney general and his assistant would proceed to enforce the same as prescribed in the acts.

The Circuit Judge upon this bill granted an interlocutory injunction, until the further order of the court, against the members of the corporation commission and the attorney general and assistant attorney general, restraining them from taking any proceedings towards the enforcement of the acts, or putting the acts in respect to freight charges or passenger rates, or any part or either of the acts, into effect, and from prosecuting any suit or action, civil or criminal, against the railway company, its officers, agents or employés. The order also provided for the execution of a bond on the part of the railway company in the sum of $325,000, conditioned to pay into the registry of the court from time to time, as the court might order, such sums of money as should be equal to the difference between the aggregate freight and passenger rates and excess baggage charges, charged and received by the company for intrastate service on its lines in the State of North Carolina, and what would have been the aggregate amounts for such service at the rates fixed in or under the acts of the assembly, above mentioned. The order provided a method of procedure by giving to each purchaser of a ticket a coupon for the payment of the difference stated, on presenting the coupon to the registry clerk, if the act should be finally held valid.

Section 4 of the act of the legislature, prescribing the maximum charges for the transportation of passengers in North Carolina, enacted that any railroad company violating the provisions of the act should be liable to a penalty of five hundred dollars for each violation, payable to the person aggrieved, recoverable in an action in his name in any court of competent jurisdiction in the State; and any agent, servant or employé of a railroad company violating the act was declared guilty of a misdemeanor, and, upon conviction, was to be punished by fine or imprisonment, or both, in the discretion of the court. The act in relation to freight, by the second section, provided that if the company should make charges for the shipment of freight in violation of the act it should be guilty of a misdemeanor, and, upon conviction, fined not less than one hundred

dollars, and the officer or agent should be fined or imprisoned, or both, in the discretion of the court.

Upon the hearing of the motion for an injunction, after granting the same, the Circuit Judge wrote an opinion (155 Fed. Rep. 756), in which he reached the conclusion that § 4 of the act in regard to passenger rates was on its face unconstitutional and void.

Notwithstanding the fact that an injunction had been granted, proceedings were thereafter taken against the appellee, a ticket agent of the company, to punish him for not complying with the act in relation to the sale of tickets, resulting in his conviction, as already stated.

The sheriff of Buncombe county, in whose custody the appellee was restrained, duly appealed to this court from the order discharging the appellee from his custody.

Mr. E. J. Justice, Mr. J. H. Merrimon and *Mr. C. B. Aycock* for appellant on the point of whether the remedy of *habeas corpus* was proper:

The writ from a Circuit Judge to a sheriff cannot properly require the production of a prisoner held by the sheriff for violation of a state law, when the prisoner has had a trial with right to sue out a writ of error to the United States Supreme Court, or when he is about to be put upon his trial, if these facts appear upon the face of the petition, or upon the return of the sheriff such are found to be the facts; in such case this ousts the jurisdiction of the Federal judge who issued the writ, and he should so hold and discharge the writ. Whenever it appears that the prisoner is held by an officer of the state court for a violation of the state law, and is not denied a hearing, the jurisdiction of the Federal judge who issued the writ of *habeas corpus* is ousted, and the prisoner must make his application for his writ of *habeas corpus* to a state court.

This is so even though the guilt or innocence of the prisoner depends upon whether the state law is in conflict with the Federal Constitution, for this can be determined by the state court, and finally by the Supreme Court of the United States. *Ex*

parte Crouch, 112 U. S. 178; *Ex parte Fonda*, 117 U. S. 516; *Ex parte Royall*, 117 U. S. 241; *In re Thomas H. Harding*, 120 U. S. 782; *Ex parte Ayres*, 123 U. S. 443; *State of New York* v. *Eno*, 155 U. S. 90; *Thomas* v. *Loney*, 134 U. S. 372; *Pepke* v. *Cronan*, 155 U. S. 98; *Andrews* v. *Swartz*, 156 U. S. 273; *Bergemann* v. *Backer*, 157 U. S. 655; *Whitten* v. *Tomlinson*, 160 U. S. 234; *Minnesota* v. *Brundage*, 180 U. S. 499; *Storti* v. *Massachusetts*, 183 U. S. 46; *Reid* v. *Jones*, 187 U. S. 151; *Riggins* v. *United States*, 199 U. S. 547; *Fitts* v. *McGhee*, 172 U. S. 516.

Mr. Alfred P. Thom, *Mr. Walker D. Hines* and *Mr. Alexander P. Humphrey* for appellee on the same point:

Wood's release upon writ of *habeas corpus* was a lawful and essential step in carrying out the decision of the court and enforcing the jurisdiction of the court.

Revised Statutes, § 753, sanctions the use of the writ of *habeas corpus* in the present case, because Wood was in custody for an act done in pursuance of an order of a court of the United States.

The right of the court to protect its order and process by the issue of the writ is unquestioned.

The expediency of the action of the court is manifest.

The court had decided that the passenger-rate statute ought not to be enforced pending final determination of the question. This decision would have been absolutely nullified if the agents of the railway company could have been imprisoned by the state authorities. This is not a mere surmise as to possible consequences, but is simply a statement of what was imminent at the time of Wood's arrest and subsequent discharge.

Not only was the supremacy of the judicial power of the United States menaced by the action of which the arrest and conviction of Wood was a part, but the whole interstate commerce of the Southern Railway Company and its transportation of the United States mails were vitally involved.

For illustrations of the discharge of persons in custody (under state authority) upon writs of *habeas corpus* by Federal courts

to effectuate their jurisdiction, see *United States* v. *Spink*, 19 Fed. Rep. 631; *In re Houston*, 94 Fed. Rep. 119; *Anderson* v. *Elliott*, 101 Fed. Rep. 609; *State* v. *Laing*, 133 Fed. Rep. 887.

The other questions involved in this case are fully discussed in *Ex parte Young*, *ante*, p. 123.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

After the jurisdiction of the Circuit Court of the United States had attached by the filing of the bill of complaint in the case already mentioned, of the *Southern Railway Company* v. *McNeil and others*, members of the Corporation Commission, and after the issuing and service of the injunction, as above stated, the defendant Wood, acting under and in obedience to the provisions of such injunction, sold the railroad tickets at the usual price and at the same time complied with the conditions contained in the injunction, by giving the coupons for the difference in price, and while so complying with the terms of such injunction was arrested and proceeded against criminally for disobedience of the act fixing rates. Being detained in custody by virtue of this conviction by one of the police courts of the State, he had the right to apply for a writ of *habeas corpus* to the United States Circuit Judge, and that judge had power to issue the writ and discharge the prisoner under § 753 of the Revised Statutes of the United States (1 U. S. Comp. Stat., p. 592), as he was then in custody for an act done pursuant to an order, process or decree of a court or judge of the United States. See *In re Neagle*, 135 U. S. 1. The writ being properly issued, the judge had the right, and it was his duty, to examine into the facts, and he had jurisdiction to discharge the petitioner under the circumstances stated.

The other questions raised herein have been sufficiently discussed in *Ex parte Young*, just decided, and require no further attention.

For the reasons given in that opinion, the order appealed from herein must be

Affirmed.

MR. JUSTICE HARLAN, dissenting.

In my judgment the appellee should have been put to his writ of error for the review of the judgment against him in the highest court of the State, competent under the state laws to reëxamine that judgment—thence to this court to inquire whether any right belonging to him under the Federal Constitution had been violated. He should not have been discharged on *habeas corpus*. *Ex parte Royall*, 117 U. S. 241; *Minnesota* v. *Brundage*, 180 U. S. 499; *Urquhart* v. *Brown*, 205 U. S. 179, and authorities cited in each case.

Upon the question as to what is and what is not a suit against the State within the meaning of the Eleventh Amendment, my views are fully expressed in my dissenting opinion in *Ex parte Young*, just decided. For the reasons there stated I dissent from the opinion and judgment of the court in this case.